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ESSAYS IN JURISPRUDENCE AND ETHICS



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IN  
JURISPRUDENCE AND ETHICS

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TO  
ERNEST RENAN.



## P R E F A C E.

THE substance of the following Essays has appeared in divers journals and reviews in the course of the last seven years. My first duty is to return my best thanks to the proprietors and editors of those publications for the consent they have freely given to the present reproduction. Some additions and rearrangements have been made, and a few passages have been worked in from articles on kindred subjects which for one or another reason did not seem worth reprinting separately.

No unity of design will be expected in a work thus composed of occasional pieces ; but I hope that so much unity of purpose and ideas may nevertheless be found in it as will give it a certain measure of coherence. The essays fall into two divisions, in the first of which legal topics predominate, in the second ethical. In the first it has been my aim to consider legal ideas and institutions as affected by or affecting the wider interests of history, politics, and practical legislation. In the second I have endeavoured to bring to a better defined issue certain points of ethical discussion by the help of distinctions founded on familiar legal conceptions, and by specifically applying those conceptions and distinctions to admitted facts.

In both subjects I have used by preference the historical method, taking that term in a wide, but, I think, not an unfairly wide sense.

There may be an apparent inconsistency in the points of view taken in some of the legal essays. I have started sometimes from the pure analysis of the modern English school of jurisprudence, sometimes from history, sometimes from practical expediency. My own opinion is that all these methods are legitimate, and that if their results fail to agree, it is the fault not of the instrument but of the worker. No doubt there exists a tendency to conflict between the historical and the analytical manner of considering legal phenomena. The historical student is tempted to regard analytical jurisprudence as shallow sciolism while the analytical jurist is apt to charge the historical and comparative method with laxity of thought and antiquarian pedantry. Both methods are in truth useful and necessary, and either of them alone is imperfect. The modern developments of legal theory have shown them in their power and in their shortcomings.

The history of law was by no means neglected before the rise of modern critical jurisprudence; but its results were of little value so long as they could not be read in the light of general ideas and principles. Blackstone gives the history of English law from the thirteenth century onwards with sufficient fulness for all ordinary purposes, and, as a rule, with great accuracy: the historical merit of his *Commentaries* has been too much overlooked in the discussion of his

faulty arrangement and inadequate theories. Montesquieu not only collects a great quantity of materials for legal history, but has a notion of historical method and comparative research far in advance of other writers of his time. Yet all this work remained unfruitful for the best part of a century. It had to be fertilized by the ideas of the analytical school. Bentham, on the other hand, had no room in his mind for history. He would have liked to make a clean sweep of all the laws and customs of Europe, and start afresh with a code warranted to secure the greatest happiness. Even language had for him no continuity to be respected. He seriously drafted specimens of legislation in a style invented by himself as the most appropriate for the purpose, and defying all the usages of common syntax. A system proceeding from this habit of mind could not easily adapt itself to the facts of different ages and societies. Its general propositions were in truth, like those of political economy, drawn from the conditions of a particular society at a particular time, or rather those conditions as they would be in the absence of disturbing elements. These conditions have still their peculiar value for scientific jurisprudence, insomuch as they are those which more and more tend to be realized in the progress of modern civilized communities. But this value cannot be rightly perceived and set on its true footing until the extreme claims of abstract analysis have broken down in the presence of unforeseen and refractory elements of fact. Thus the Indian village community shows us a state of society to which,

though it is an orderly and well-settled one, Bentham's or Austin's definitions are applicable only by doing extreme violence to language; and the consideration of such phenomena has led Sir Henry Maine to apply the needful correction to the analytical theory. Again, in the art of legislation the analytical intellect is indispensable to give us the power of expressing clearly what we intend, while the historical view comes in to help our choice of immediately desirable and practicable objects. If it be asked whether analytical and historical work are to go on correcting one another for all time, I am disposed to say that probably they will. All scientific definition is really provisional and approximative; and all applications of our knowledge to the actual conduct of life are endeavours towards an ideal which, however near we may come to grasping it, will ever escape our full possession.

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## I.

# THE NATURE OF JURISPRUDENCE

CONSIDERED IN RELATION TO SOME RECENT CONTRIBUTIONS  
TO LEGAL SCIENCE.<sup>1</sup>

PROFESSOR HOLLAND of Oxford is to be congratulated on having done a piece of work that was much called for. Though several years have passed since the Universities and the Inns of Court proclaimed the importance of jurisprudence as a part of legal education, nobody has taken up Austin's unfinished work in a serious or satisfactory manner, or succeeded in making it very clear what jurisprudence really is. To English students it means at present, for all practical purposes, the two volumes of Austin's Lectures, or the one volume into which their matter has been more lately condensed by his able editor. It may be true of Austin's work, as Professor Holland says, that

<sup>1</sup> *The Elements of Jurisprudence.* By Thomas Erskine Holland, D.C.L., etc. Oxford: Clarendon Press. 1880. *The Institutes of Law: a Treatise of the Principles of Jurisprudence as determined by Nature.* By James Lorimer, Advocate, Regius Professor of Public Law and of the Law of Nature and Nations in the University of Edinburgh, etc. Second edition, revised and enlarged. Edinburgh and London: William Blackwood and Sons. 1880. *International Law.* By William Edward Hall, M.A., Barrister-at-Law. Oxford: Clarendon Press. 1880.

no one can read it without improvement; yet he seems to confine his praise to the introductory part, originally published as "The Province of Jurisprudence Determined," and so far I am quite of one mind with him. In any case, it is not desirable that Austin's should remain for an indefinite time the only means of improvement in this department of knowledge available for our seats of learning. It is, after all, a fragmentary publication, and has the faults incidental to this character, in addition to the others with which it is chargeable. As I am not now criticizing Austin, I will only say that these are precisely of the kind which make a book less fit for the use of beginners. Besides, the increase of general knowledge and interest has a certain effect on the relative importance of different parts of a great subject. "Those distinctions upon which Austin, after his somewhat superfluously careful manner, bestows most labour are put in so clear a light that they can hardly again be lost sight of;" and if there is one thing more than another for which we ought fervently to thank Austin's labours, it is that at this time of day no rational being could or would occupy six lectures with the discussion of what positive law is not. For the rest, Professor Holland's preface, while it points out with unquestionable truth that "works upon legal system by English writers have hitherto been singularly unsystematic," is studiously courteous to his predecessors. It is perhaps an excess of courtesy to mention Dr. Broom's work on *Legal Maxims*, a thing of neither fish nor flesh, on the same level with

Smith's *Leading Cases*, which, though it never pretended to be anything but technical, stands in the first rank of our technical books.

Jurisprudence is defined by Professor Holland as the formal science of law: "not the material science of those portions of the law which various nations have in common, but the formal science of those relations of mankind which are generally recognized as having legal consequences." It stands towards actual legal systems, past or present, in a relation like that of grammar to particular languages. As a matter of fact, its construction has been suggested by the comparison of different systems; but such comparison is not in itself a necessary condition for the existence of such a science. "Just as similarities and differences in the growth of different languages are collected and arranged by Comparative Philology, and the facts thus collected are the foundation of abstract Grammar, so Comparative Law collects and tabulates the legal institutions of various countries; and from the results thus prepared the abstract science of Jurisprudence is enabled to set forth an orderly view of the ideas and methods which have been variously realized in actual systems."

The parallel is felicitous, and only too felicitous. If it be just, it goes a little too far for the writer's purpose. Abstract grammar, in the sense here specified, is evidently a conceivable science. But is it an actual science in the sense of being explicitly taught or learnt by any one? We have never heard of its professors or text-books. No such teachers or books,

as far as I can learn, have been called forth by the development of modern philology. Nor is there in fact room for them. Abstract grammar is given by implication in every systematic grammar of a particular language, and its generality appears as soon as the grammatical structure of two different languages is referred to a common type. When the English schoolboy who has learnt Latin learns (if he ever does, which, with our existing methods, is uncertain) enough of his own language to know that the verbal-substantive forms in "I go a-fishing" and in "Lusum it Maecenas" are homologous, he makes an application of abstract grammar. When the comparative philologist performs a like process on a larger scale, he must either come to his task equipped with a scheme of abstract grammar or make one as he goes along. But neither boys nor men learn abstract grammar by itself. The reason, I conceive, is that the subject-matter cannot be understood until the learner has mastered the grammar of at least one concrete language; and, if the language be a tolerably developed one, and the grammar arranged on a tolerably rational plan, in learning the matter he has learnt the form also. There is no need for his learning it over again in the abstract. In order to appreciate its importance as form, he has only to await the occasion of applying it to new matter. Perhaps it may be said that a person who, being empirically master of his own language, takes up the grammar of it for the first time, is really learning abstract grammar; for in this case the matter consists of what he knows already. Not the less does

he acquire the abstract system through the concrete application. We may observe in passing that Philology is considerably richer than Jurisprudence both in the variety of actual types to be observed and in the number of distinct systematic arrangements that have been constructed. Greek, Indian, and Arabic grammarians worked out their schemes in perfect independence. It would seem that philologists have great opportunities for elaborating the science of abstract grammar. What use they have made of them is more than I am competent to say; but one cannot help suspecting that our leaders in philology would not think such an operation very profitable.

Again, the student of medicine learns vertebrate anatomy, which is the knowledge of particular vertebrate structures. He learns comparative anatomy, whereby he comes to perceive the analogies of different vertebrate structures. Hence he forms the idea of a general vertebrate type, which is not the image of any existing skeleton, but is a generic symbol of a certain disposition and relation of parts which any specific vertebrate skeleton embodies and makes visible. Shall we regard this as a new and distinct knowledge or science, and call it abstract vertebrate anatomy? And, if we do, can it be taught or learnt in its abstract character?

It appears to me that jurisprudence, as more or less vaguely understood in English usage of the term, and now clearly defined by Professor Holland, is doomed to vacillate between two alternatives, of which both are unsatisfying. It may confine itself to making

out a catalogue of blank forms; in other words, to the pure theory of legal classification. I do not for a moment deny that the scientific arrangement of the law is a subject worthy of the most careful discussion. But I do not think it a good subject to be dwelt upon by students at an early stage. The reasons for or against a particular scheme cannot be understood until the matter to be dealt with by it is to some extent familiar. If, on the other hand, jurisprudence undertakes to explain and illustrate the blank forms of its classification by showing how they are filled up, its constant tendency is to slide into the partial exposition—comparative or otherwise—of some particular system. This tendency appears more than once in Professor Holland's work, as where he brings in a statement of the peculiar and by no means elementary English doctrine of contributory negligence. One feels, again, that his broad mention of the results educible from the tangle of statutes that make up our law of copyright is either too much or too little,—too much for a treatise on the general form of laws, too little for a treatise on the laws of England.

Since the law of England is, by the consent of all persons who have seriously thought about it, in sore need of a systematic expounder, the best and most profitable way to prove the value of jurisprudence would perhaps be to show it in that specific application. If Professor Holland, or some other equally competent worker, or two or three such together, would give us a good book of Institutes of English Law, that would indeed be a boon for lawyers and

students to welcome. As it is, our young men hear systematic lectures on jurisprudence and legal method in general, and have meanwhile to pick up their first notions of the law of their own country from mauled and tinkered editions or imitations of Blackstone put together in defiance of all rational arrangement. Blackstone's work was an excellent one in his time and according to his lights; we might honour him better at this day than by a blundering lip-service which, as a rule, effectually excludes the knowledge of what Blackstone really wrote. The modern editions utterly spoil Blackstone as literature, without producing a good account of the modern law. One consequence of this is that the historical value of Blackstone in his genuine form is apt to be sadly underrated.

And, in fact, if we turn to Germany, where the academic teaching of law is more fully developed than with us, we shall find a state of things which Professor Holland mentions with a certain air of surprise. Although the last thing that can be said against the German school is that the philosophical and theoretical consideration of legal conceptions fails to find expression in it, there are no distinct organs or departments for the purely formal science of law. What in England we have lately called jurisprudence is embodied by German writers in their extensive and methodical treatises known as *Pandekten*, of which the subject is modern Roman law,—that is, so much of the Roman civil law as has furnished, or may be considered capable of furnishing, the groundwork of the modern law of German States. Most, if not all, of

these works contain a certain amount of matter of a highly general nature ; but this is treated, and as I think rightly so, as preliminary to the study of the particular system.

At the same time, I am far from saying that under the peculiar conditions of English legal literature the study of legal ideas in their most abstract form is not useful and necessary. But I think a scientific exposition of English law would be still better, and should be regarded as the end to which our provisional study of abstract jurisprudence is to lead up. This position may be illustrated by returning to the philological comparison which has already been used. Let us suppose that the English language, instead of being the simplest member of a group, stands apart from all others, and is exceedingly complex in structure and full of anomalies. Let us also suppose that the literature relating to it—comprising grammars, dictionaries, and philological works of all kinds—is of enormous bulk, and contains much matter of great value, but is terribly diffuse, and arranged partly on wrong systems, and mostly on no system at all. In this state of confusion it might well be that the cultivation of abstract grammar would precede the actual reform of English grammar, and it is even conceivable that this might be the only way to it. And this imaginary case is roughly parallel to the real state of English laws and law-books. A general view of the field of Positive Law, with only just so much concrete illustration as is needed to make it intelligible, may do much to clear the heads of learners, and beget in them a just discon-



tent with the crude and formless condition in which the details of almost every topic are still left. To make a cosmos out of this chaos of disjointed particulars is a task which a later generation, prepared by such teaching as Professor Holland's in this book, and Mr. Markby's in his *Elements of Law*, may be able to attempt with good hope of success.

It remains to say a few words of the manner in which Professor Holland handles in detail the subject which he has defined as the formal science of law. His exposition is clear and careful throughout, and the work is, for law students' purposes, a great improvement on Austin. Though considerably less bulky, it is more complete, more symmetrical, and more intelligible. As literature it is almost incomparably better. Austin's painfully laboured style has an effect amounting to repulsion on some persons, of whom I confess myself to be one. Professor Holland's is concise without abruptness, flowing without tediousness, and distinct without wearisome repetitions.

The subjects discussed at the outset are naturally the definition of law and the theory of sovereignty. The two chapters on the various usages of the word *law* might perhaps bear to be yet further shortened. I should doubt, indeed, whether their subject is properly within the scope of jurisprudence. Professor Holland's definition of law runs thus:—"A general rule of external human action enforced by a sovereign political authority,"—or, should we say, purporting to be enforced? for not every sovereign can make sure of enforcing his commands; and sometimes laws are

made without even any great intention of enforcing them. I do not see why this should not come at the very beginning, with the statement that only such laws as answer this description are the subject of legal science. However, the opening chapters as they stand form a good introduction to the modern terminology. Proceeding to the theory of sovereignty, Professor Holland confesses and avoids Sir Henry Maine's criticism of the extreme analytical doctrine, which is or ought to be by this time well known, and sums up his own result in these words:—"It is convenient to recognize as laws only such rules as are enforced by a sovereign political authority, although there are states of society in which it is difficult to ascertain as a fact what rules answer to this description." But the qualification seems not quite adequate. In the states of society specified by Sir Henry Maine, and to this day prevailing over a large part of the earth, the difficulty is not merely to ascertain what rules of conduct are true laws, but to find any person or body answering the description of a sovereign political authority in the sense required by the analytical school. The half-dozen pages on customary law strike us as particularly good. Professor Holland brings out and harmonizes the elements of truth in the opposed views of the English analytical and the German historical jurists. Austin's contention that customary law "is nothing but judiciary law founded on an anterior custom," is disallowed as being repugnant to the facts. The Courts decide whether an alleged custom is or is not binding, not at their

pleasure, but according to settled rules. The conditions on which the validity of a custom depends must be present, if they are present, before the case occurs for decision; just as the text of an Act of Parliament has the force of law when the Act is passed, though it may afterwards call for judicial interpretation. In this case the retrospective application of the construction arrived at by the Court is obviously necessary; and what takes place when a custom is allowed is essentially the same. Indeed similar considerations might be shown to apply largely, though not universally, to the declaration of rules of common law; so that in this sense, though not in the sense intended by Austin, his dictum above cited may be accepted.

In the chapter on Rights a series of definitions is carefully and elegantly worked out; the distinction between might, moral right (as sanctioned by existing positive morality), and legal right, is exceedingly well put, and ought to nip in the bud a good many fine flowers of confused thinking. The only point on which a little more explanation might be useful is the difference between positive morality and ideal morality, which is not expressly noticed. Legal right is defined as a capacity residing in one man (we should rather say "person," as man does not include artificial persons) of controlling, with the assent and assistance of the State, the actions of others. In popular usage we speak elliptically of a man having a right to use his property as he likes, and so forth; whereas his right is, accurately speaking, to prevent other people from interfering with his use. This does not, how-

ever, affect the correctness of the definition. With regard to persons as subjects of rights and duties ("Träger der Rechtsverhältnisse," as the Germans more neatly have it), Professor Holland has invented two new terms; he calls the person entitled "the person of inherence," and the person bound "the person of incidence." Perhaps these are hardly necessary, but they are at least innocent. In his general classification of the subject-matter of positive law Professor Holland takes rights in preference to duties as the starting-point. This arrangement may be the more easily understood at first sight, but I am disposed to regret the choice. It is impossible to arrange a body of law under a scheme of rights without some dislocation or repetition. After going through the categories of substantive rights, you have to start afresh with a catalogue of wrongs, consisting to a great extent in the breach of duties corresponding to the rights which have already been set forth. Another objection is that all rights have corresponding duties, while some duties (Austin's "absolute duties") have no corresponding rights, and therefore a classification founded on rights is, by the nature of the case, incomplete. But this is not admitted by Professor Holland, who maintains that the State's being the fountain of legal right does not prevent the State from having rights as well as any other artificial person, or even from having duties "such as it prescribes to itself," in so far as it submits to the jurisdiction and the decisions of its own Courts. This, I think, is just; yet there are various duties of a more or less public

kind as to which it is not easy to say where the corresponding rights are, and cases are frequent in practice where there is no doubt as to the person bound, but the person entitled can be ascertained only after a lapse of time, certain or uncertain, or by judicial decision between adverse claims. It is true that the devolution of duties is also at times difficult to trace. The duties attached to trust estates afford a signal example.

It is satisfactory to find that Professor Holland retains the ancient and fundamental division of Private and Public Law, and disapproves rather summarily of Austin's curious aberration on this point. Few as English attempts at legal classification have been, we have already had far too much of straining after novelty for novelty's sake. One or two late writers, whose ambition is apparently to be the Blackstones of our time, have made their work all but worthless by deliberate confusion of the familiar boundaries. With regard to the troublesome question of the law of status, and its due place in a system, Professor Holland starts from the citizen of full age and capacity as having "normal rights." Differences in status consist in departures or degradations from this normal capacity, which are attached to particular personal conditions, such as infancy or coverture. The rights and duties which arise from the relations of normal citizens to one another come naturally to be considered in the first place; then we consider them as they may be affected by the abnormal condition of one or both parties. "The inquiry into the law of Persons is thus supple-

mentary and secondary to that into the residue of the law, commonly called the law of Things." To this it may be added that the law of Persons is more subject to historical and local variations, and more difficult to refer to any generally accepted principles. Take, for instance, the rules on such a topic as the contract of sale, as we find them in the *Corpus Juris*, and as they now exist in any State of the civilized world, and then make the like comparison as to marriage and its legal incidents and consequences. In the first case the differences will be appreciable; but—whether as between the Roman and any particular modern system, or as between the laws of different modern States—they will be trifling as compared with those which strike us in the second. At the same time the importance of the law of Persons as compared with the law of Things is ever on the wane in modern systems. In Hindú law the family and caste are everything, and equal rights of equal individuals are next to nothing. In the world of modern law caste and slavery, the great ancient heads of personal inequality, have disappeared, and the law of Persons is but a fraction of the whole body. These are additional reasons for putting the law of Things, with Professor Holland, before the law of Persons. Yet one has a certain lingering prejudice in favour of the Roman arrangement. The law of Persons gives a kind of dramatic interest to the opening of the subject. Perhaps the separation of the whole body of law into a General Part and a Special Part, after the German example, might help to solve the

difficulty. The broad characters of status would come into the General Part. In the Special Part there would probably be no need for a separate treatment of the law of Persons, but the details would be worked into the subjects specially affected by them. Thus the general nature of an infant's disabilities would be mentioned under the general chapter of the law of Persons, but his power of binding himself by contract would be discussed afterwards under the law of Contract. As to the nomenclature, there is a little awkwardness in using the term "abnormal" for a condition such as infancy, through which every natural person has to pass, or the existence of a corporation, which is not only familiar in every civilized country, but is really an extension of the power of the individuals composing it. But it is etymologically appropriate, as Professor Holland shows by comparing the old grammatical arrangement of the declension of nouns, in which the cases are artificially viewed as departures from an assumed normal form; and nothing better has yet been proposed.

Professor Holland speaks of "antecedent" instead of primary or sanctioned, and "remedial" instead of secondary or sanctioning, rights. It occurs to me that "substantive" and "adjective" might do as well, and mark more distinctly the relation of rights to procedure. We have already "substantive law" and "adjective law," the latter being the law of procedure. Now remedial rights are the rights with which the law of procedure is concerned. Primary or antecedent rights are enforced only through the medium

of these, as there can be no proceeding except by some one who has a right to proceed. Why not, then, use the term "adjective rights" for the rights which are worked out by adjective law? Moreover, the term "remedial" is not always appropriate; there are proceedings, such as interpleader and payment of money into Court by a trustee, where the first step is taken by a party who seeks to be relieved, not against some one else's breach of duty, but against the risk of unwilling breach of duty on his own part. That in so doing he exercises a right is clear; but it can hardly be called either sanctioning or remedial.

We need not follow Professor Holland minutely through the various topics of Private Law. On the law of ownership it is neither easy nor desirable to say anything very new, though, in mentioning what things cannot be property, Professor Holland makes the rather sweeping statement that "air *and water* are obviously for the free use of all mankind." As regards water there is obviously a great deal, such as ponds in private grounds, which is not for the free use of mankind in any sense, and still more, such as portions of rivers subject to rights of lower riparian owners, of which the use is not free in the sense of being unlimited. However, it is true that water running or standing in its natural state cannot be stolen; and Blackstone even speaks of "the elements of light, air, and water," as things which "must of necessity continue common by the law of nature." Under the head of rights *in personam*, Professor Holland makes a chapter of rights *ex lege*; we should prefer to say



rights appendant or rights annexed by law, as *ex lege* in this sense is hardly good Latin. This term comprises the rights of husband and wife (because, though the existence of the state of marriage depends on the will of the parties, its incidents do not), with other family relations; trusts, the quasi-contracts of the civil law, the fictitious contracts of English law which were the subject of the old "common counts," and some other relations of a like sort arising from circumstances independent of contract. We do not find any notice of the analogous rights *in rem* which belong to the head of obligations *quasi ex delicto* in Roman law, and with us have been established by the class of decisions laying down the measure of an owner's liability for the safe keeping of dangerous things. I think myself that the term *quasi ex delicto*, decried by Austin and others as unmeaning, is both significant and appropriate for liabilities of this kind. Where a man was held liable for the acts or defaults of other persons, the Romans did not see their way to saying he had committed a delict. There was no *maleficium* on his part if a slave did damage by throwing rubbish out of his house in Rome while he was away in Campania. Yet it was thought right he should answer for it as if the act had been his own, and the liability was naturally and fitly described as *quasi ex maleficio*. This conception has a certain special importance for us in England. In our law there is a border-land where contract and tort overlap, and the key to these phenomena must be sought in the idea just mentioned, or a closely analogous one.

Before entering on contracts proper, Professor Holland remarks in effect that the action in "tort founded on contract" of English law is from the scientific point of view, anomalous, which is true. Nevertheless the action in tort is, as matter of history, much the older; and it must be remembered that, down to the Common Law Procedure Act the commonest form of action on contracts was a modified action on the case. There must have been a widely-spread notion that even when the contract was not enforceable as such, say for want of formality, it created a kind of special duty of which a wilful or negligent breach would be actionable. The needful extension of duties *ex contractu* was arrived at circuitously through the supposition of a duty *quasi ex delicto*.

In the chapter on Remedial Rights it is said that "so long as all goes well the action of the law is dormant;" we think it should have been added that so far as things do go well it is in some measure due to general knowledge that the law, if broken, will be enforced, and that thus the law is really most operative when least conspicuous. International law is happily described as "the vanishing point of Jurisprudence;" and here we leave Professor Holland on the verge of the ground specially assigned to him by his office, on which, however, the plan of his work forbids him to enter at any length on this occasion.

In the same year that Professor Holland's *Elements of Jurisprudence* appeared at Oxford, there issued from Edinburgh the second edition of Professor Lorimer's *Institutes of Law*. This is the only work

known to me which adequately sets forth in English a view of the nature of jurisprudence diametrically opposed to that of the English analytical school. It would, therefore, be valuable even if this were only fairly well done; but Professor Lorimer has done it as well as it can be done, and has procured a refined satisfaction to followers of the English school who take up his book: I mean the satisfaction of reading a vigorous and well-written exposition of a theory with which one entirely disagrees. We can imagine an English student of jurisprudence, parched with the stern limitations and crabbed analysis of Austin, turning with interest and even eagerness to seek variety in Professor Lorimer's treatise. He would certainly not be disappointed in that respect. Almost the whole of it deals with topics which, according to the English view, may be philosophical, or ethical, or political, but are distinctly outside the province of jurisprudence. In other words, our English school holds that the absolute law which is or should be the origin and pattern of all existing laws,—*Naturrecht* as the Germans call it,—either does not exist or does not concern lawyers more than any one else. What is here delivered from the Chair of Public Law in Edinburgh is a book of *Naturrecht* from beginning to end. It contains in detail much good writing, much ingenuity, and not a little good sense on various political and social questions; the credit of all which belongs, in my opinion, to Professor Lorimer's person, and in no way to his system. As to the impression made by it as a whole, I confess for my own part to

feeling rather like the young man in Grimm's *Märchen* who went out to learn to shiver, and whose curiosity was finally satisfied—after the total failure of a haunted castle and other adventures—by the application of a pail of cold water from the brook with the little fishes in it. I had long known of *Naturrecht* as a thing existing in German books, but it had never come in my way to any serious extent. The German writers, for instance, who expound the Roman law for the benefit of practical students disclose very little of it. We have to thank Professor Lorimer for revealing the mystery in as good English as the nature of the subject admits. As I came to the last page I said to myself with a mental gasp and shiver, "Ugh! ugh! now I know what *Naturrecht* is." Natural law, as conceived by Professor Lorimer and his authorities, appears to cover a great part of what is commonly understood in this country by moral and political philosophy; the foundations of moral obligation, the extent of the power which the State ought to exercise over citizens, the duty of the citizen to obey the laws of the State, the nature of justice, the analysis of the political ideas of liberty and equality, the methods of political discipline and instruction, and much else which cannot here be specified. We find in addition a sort of introductory digression on ethnology and the history of religions, in which it may be observed that the discussion of Buddhism is not brought up to the existing state of knowledge on the subject. In my view it is also irrelevant, but not more so than the rest of the chapter in which it occurs. This, it is fair

to say, is about the only point at which there is anything to except to on the score of workmanship ; for when Professor Lorimer's method allows him to come down to the region of tangible facts, he is generally accurate. Nor can we dispute his right to adopt, as he does in this chapter, Sir A. Grant's rather fanciful conjecture that the founders of Stoicism were of Semitic blood. A significant guide-post to the general direction and spirit of the work is the manner in which Professor Lorimer uses the term "positive law." To an English reader this means actually existing law—the law which the courts of justice and the executive powers of government enforce, or profess to enforce, at a given time and place. Professor Lorimer treats this usage as a mere aberration, and almost makes an apology for mentioning it. For him "positive law" is not the enforceable law which does exist,—the law of Scotland, for example, as it stands at the date of his writing,—but that which would exist if, the actual circumstances being otherwise the same, legislators and judges were perfectly wise. The law as it does exist is called "enacted law," and dealt with as on a quite subordinate footing. "Human enactments," we are told, "never attain to the full character of positive laws. But they possess the character of positive laws, more or less, in proportion to the extent to which they are, or are not, interpretations and realizations of the law of nature." In this nomenclature the law of employers' liability as modified by the Act of 1880 on that subject is only "enacted law;" the "positive law" is what an infallible Parliament would have

made it; in other words, it is something theoretically ascertainable, but of which every man will have his own theory. In Professor Lorimer's own words, "though necessarily existent and discoverable, positive laws never have been, and probably never will be, perfectly discovered." This kind of "positive law" is, however, not coextensive with the law of nature. For the law of nature includes all moral duties without exception, and it is not to be assumed that a perfectly wise legislator would attempt to enforce all moral duties. Again, natural law is described as binding on all rational creatures, while the ideal "positive law" would, in Professor Lorimer's view at any rate, be adapted to the varying polity and circumstances of each State. For instance, the English and Scotch rules on a particular point might be different, though they were the best possible for England and Scotland respectively. Still more would this be the case as between countries in different stages of civilization.

This nomenclature shows of itself, as indeed the book shows wherever one opens it, that the school followed by Professor Lorimer concerns itself far less with law as it is than with law as it ought to be, or at least regards the consideration of law as it ought to be as forming the fit and necessary philosophical prolegomena to the study of law as it is. My own view (and, I think, the view of most English students) is a totally different one. I think it a mistake to preface the study of legal conceptions by an exposition of transcendental ethics, and not less a mistake to pre-

face it, as Austin did, by an exposition of the principle of utility. I do not see that a jurist is bound to be a moral philosopher more than other men; though I do think it quite possible that a lawyer who happens to study moral philosophy may find a legal habit of mind and legal analogies of considerable use in clearing up his ethical conceptions. It is true that positive law in the English sense, the "enacted law" of Professor Lorimer, assumes the existence of society and morality. There must be a body of men living continuously together, and there must be among them a fairly settled body of prevalent opinion as to what is right and wrong. This latter condition is not really an independent one, since, if a settled common opinion about matters of conduct failed to become established or ceased to exist, the society could no longer hold together. As a further condition for the existence of law as distinct from custom and morality, or, to speak more exactly, for the differentiation of law and morality out of custom, there must also be a general understanding that some rules of conduct are fit to be enforced by definite means of compulsion, and in the last resort by the whole power of the society, and others are not. And there must be some sort of common agreement, though it may be, and mostly is, a vague and rough one, and obscurely felt in the common sense of the average citizen, as to the boundary to be drawn between these classes of rules. Yet more is wanted before we can have a civilized and effective system of law. The commonwealth must assume and exercise a power beyond that of issuing

commands for the purpose of repressing actual crime and wickedness and strengthening righteousness. There are many matters indifferent in themselves in the sense that they may be dealt with in one way as well as in another, but not indifferent in this sense, that it would be of great inconvenience if they were not dealt with in some uniform way. We may name the rule of the road as a simple and familiar case. On such matters the community lays down fixed rules, not to enforce this or that course of action as right in itself, but just for the sake of having a fixed rule. These rules, when made, are as much entitled to observance as those which add the legal sanction to what is already prescribed by morality; though we rather fail to see what account can be given of them by those who put their trust in the supposed law of nature, unless they come down for the nonce to a "question of what is vulgarly called expediency," as Professor Lorimer delicately puts it. Reflection shows that all positive law must have more or less of this arbitrary, or rather discretionary, element. For while the moral law says to an Englishman, as it did to a Roman, "Thou shalt not steal," the Roman law said, "If you steal you shall be liable to an *actio furti*;" but English law says, "You shall not be liable to a civil action, but you may be tried by a judge and jury, and sentenced to penal servitude." English law, moreover, defines with great elaborateness, and perhaps not with perfect reasonableness, what is and what is not theft. But in administration the substance of the law cannot be distinguished from the particular defi-



nitions and provisions in which it takes its form. For if this and that citizen were free to observe or not observe it at his discretion in this or that particular, it would no longer be law. And thus among civilized people, after the distinction between law and morality is fully established, it comes to be understood that it is a specific moral duty to obey existing positive law, not only when we cannot see the reason for it, but when we think the reason a bad one. This is subject to the exception of the extreme cases in which rebellion is morally justifiable; and the case of a serious claim of legal right as against a particular authority within the State, or a usurping power, is not an exception at all. But it is understood, or ought to be, that to refuse obedience to an existing law because one dislikes it is, as far as it goes, rebellion and nothing else. And even in exceptional cases persons who resist the *de facto* possessors of legal power do it at their own risk, and cannot complain of being treated as law-breakers or rebels if they fail.

I have thus set down with needful brevity what I conceive to be in a general way the moral data presupposed by the positive law of civilized nations. It will be observed that nothing whatever is said about the historical or rational origin of morality, or the nature of moral obligation in itself. I have tried to say nothing inconsistent with Professor Lorimer's or any other transcendental scheme of ethics. We may take the morality of men living together in settled societies as an existing and sufficiently ascertained fact. It is for the moralist and the metaphysician to

analyse it if they can ; enough for us that it is there. Even with this limitation I do not think that the statements I have just now made, be they right or wrong, are propositions of jurisprudence. The topics may be admissible as belonging to a sort of borderland or penumbra of legal science. An introductory sketch of the outlying affinities and analogies of a special subject is in many ways useful, and is common in the practice of teachers. But we deny that the jurist requires, as Professor Lorimer assumes him to require, "an absolute basis for his science." Why should he not, like other people, be content with a basis of acknowledged fact ? Positive law exists. In other words, there are certain social institutions which are protected, and certain rules of conduct which are in various ways and degrees enforced, by the courts of justice of all civilized countries. The fact is notorious and intelligible to all men of all ways of thinking, whether they account for it by deduction from the law of nature or otherwise. If the jurist accepts it as for his purposes ultimate, he does only what all other students of special sciences do ; we may add, what they did and must have done in order that those sciences might be constructed. Where would geometry be if the geometer were expected at the outset of his work to grapple with the metaphysical difficulties that beset our notion of space ? Where would physics be if the physicist had to explain the existence of matter ? Kant is the great founder of our modern criticism of ultimate philosophical notions ; but we know very well that Kant

himself expected nothing of this kind from men of science. And the cases appear to me precisely parallel. Geometry is the science of space, and physics the science of matter, in the same way that jurisprudence is the science of laws. The special sciences furnish the data of philosophy ; they do not need a complete philosophy to stand on their own ground. If they did, we should be in but a sorry plight. Observe, too, the warning to be derived from the analogy. Discussion of the nature of space is rendered possible only by a highly developed geometry ; rational discussion of the nature of matter only by advanced physical knowledge. And we may fairly contend, without prejudging the issue between transcendental and empirical theories of duty, that profitable discussion of the origin and nature of laws in general must follow, and not precede, the scientific study of laws as they exist. Whether that study can in the long run be conveniently exhibited as a thing apart from and theoretically preceding the study of any particular system of laws is a question which deserves attention. Something has been said about it above in connection with Professor Holland's *Elements of Jurisprudence*. It does not arise upon anything in Professor Lorimer's book, for the simple reason that he barely gets to the threshold of the topics that properly belong to jurisprudence, general, comparative, or particular, as understood by Professor Holland and ourselves. To sum up the general criticism : The jurist or legislator, even on Professor Lorimer's own showing, has to accept the laws of

nature as facts. If, as facts, they are equally accessible to all rational men, and equally material to be known and acted upon, I cannot see why the jurist is bound to analyse them philosophically more than any other rational man. If in the knowledge of them there is anything peculiar to jurists or legislators, they seem to that extent to lose the universal character which is said to be a mark of natural law. So far as the *iusti atque iniusti scientia* from which the lawyer starts is something which he does not share with laymen, it is a special and technical piece of knowledge,—a law of lawyers' nature at most, not of human or rational nature.

But after all, it may be said, writers are free to define their subjects in their own way. The University of Edinburgh and its professors have a perfect right to say that "Institutes of Law" shall mean the general prolegomena of politics and the theory of legislation. To this I reply that the same method which, in my opinion, leads to a misconception of the nature and scope of legal science no less appears to me to lead to waste and misdirection of power in the subjects actually treated by it under the name of legal science. It may be the radical perverseness of English habits of thinking, but in my English eyes much of the work done by Professor Lorimer—and, as far as execution and expression go, thoroughly well done—either arrives by high-flying and circuitous roads at obvious general conclusions, or arrives at more precise ones by a slenderly disguised appeal to the principle of "what is vulgarly called expediency."

Thus the question is brought up of the State's right to inflict and regulate punishment,—a question which, from the English point of view, has in jurisprudence no meaning. The solution comes round, however, to the position that for the individual citizen the State is infallible. “The fact that one form of punishment attains the object of the absolute law better than another must be proved; but the competence of the Legislature to determine the adequacy of the proof must be assumed as the hypothesis on which all positive law rests.” This is simply the analytical doctrine of sovereignty stated in a slightly varied way. More than once, indeed, we have a feeling that, while the voice is the voice of a teacher propounding transcendental *Naturrecht*, the hands are the hands of Hobbes. In Professor Lorimer's system right and might ultimately coincide; as they likewise do, be it observed, in Mr. Herbert Spencer's, or in almost any scheme which takes account of the progressive character of morality and civilization. Further, Professor Lorimer holds that we must act on that which appears, and that for many purposes might is the best or only evidence of apparent right. He fully accepts the position that “right to be” is measured by “power of being,” and thus gives a hand back to Hobbes and forward to Mr. Spencer. As between independent nations, he lays down permanent success as the permanent test of right. Only righteous conquests endure, and all enduring conquests are righteous. And yet almost in the same breath Professor Lorimer makes the statement—to our

Southern ears paradoxical—that laws cannot create rights, and calls to witness a famous passage of Burke's, of which it is sufficient to say that Burke spoke not as a jurist, but as a statesman.<sup>1</sup> In denying “the position that any body of men have a right to make what laws they please,” he was really protesting against that very confusion of legal right with moral right or political utility which the transcendentalists bring back from the other side. What Professor Lorimer is doing is to state in the transcendental manner that laws will not work, or will work badly, if they are made without due regard to the facts. The matter is true, but the manner is itself a defiance of fact and usage. Laws made by the supreme power in a State, be they wise or foolish, do create claims which that power will, by the Courts and otherwise, do its best to enforce, and these claims are called rights by everybody save transcendental philosophers when they are philosophizing.

One good test of the worth of ideas and theories in general jurisprudence is their application to international law. This task had too long been left unattempted by the English school. As to the subject itself, it is one in which English citizens and statesmen are at least as deeply interested as those of any other country, and in which there are peculiar objections to receiving the doctrines of foreign writers without a certain amount of caution. Our reproach has now been taken away by Mr. Hall, and so well that with his book in hand an English lawyer need no

<sup>1</sup> *Tracts on the Popery Laws*, Ch. 3, Part 2.

longer be afraid to speak in the gate with any of the American or Continental authorities. In a work that covers so much debatable ground much must of necessity be exposed to criticism. In fact, a writer on international law has to be perpetually on the verge of controversy. He must embark on almost endless discussion of a mixed mass of precedents and reasons, in which the exact value of the precedents is seldom known, and the reasons are constantly biased by theoretical assumptions or political interest. No doubt there is a certain amount of settled principle, but the application of it by different States in their conduct and by different writers in their books is so various that what agreement there is appears at times to be illusory. One method much approved among writers on the law of nations is to simplify troublesome questions by assuming that rules are settled when they are not ; taking care, of course, to pick out among the conflicting opinions that one which favours the writer's own sentiments, or seems to promise most advantage to his nation. Such is not Mr. Hall's way. Whatever else he does, he is always frank in facing difficulties. He treats international law as a study of real facts, not a scheme to be elaborated by deduction without regard to the actual behaviour of princes and rulers.

At the outset of his book Mr. Hall explains with laudable clearness that he intends to proceed not on transcendental but on empirical principles. His first statement, carefully framed not to prejudge controverted points of speculation, is that "International

Law consists in certain rules of conduct which modern civilized States regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement." These rules "may be considered to be an imperfect attempt to give effect to an absolute right which is assumed to exist and to be capable of being discovered; or they may be looked upon simply as a reflection of the moral development and the external life of the particular nations which are governed by them." Besides these two views, there is a mixed or intermediate one to the effect that international law is founded on some kind of absolute right; but the evidence of what is right must be sought in positive law and usage. "In the following work," adds Mr. Hall, "the second view is assumed to be correct." The reasons given for it are, in my opinion, conclusive. Their general tenor is, or ought to be, not unfamiliar to every one who has studied in the English school of jurisprudence; but I doubt if they have ever been so clearly and completely stated. They are reinforced, moreover, by an interesting Appendix "On the Formation of the Conception of International Law," which is a good, concise introduction to the history of the subject. Among these preliminary topics Mr. Hall is especially instructive on the value of treaties as evidence of what the law of nations is. It is supposed by some writers that treaties form a sort of



international case-law; but, as Mr. Hall truly points out, even if they profess to declare existing law, the declaration can bind only the parties who make it. A competent number of such declarations to the same effect might conceivably establish a consensus of great weight; but, again, "it cannot be admitted that the greater number of treaties do in fact express in a peculiarly solemn manner, or indeed at all, the views of the contracting parties as to what is or ought to be international law." The chief value that treaties possess is really historical, "as marking points in the movement of thought." If we find at a given time a particular new practice or modification of old practice occurring as matter of express convention in several treaties, and if afterwards these treaty stipulations "are found to become nearly universal for a while, and then to dwindle away, leaving a practice more or less confirmed," this is good evidence that something which was introduced by way of special agreement has passed into the common usage of nations, and is no longer thought to need the protection of express treaty rights. And as to usage Mr. Hall justly points out that the usage of all nations is not of equal value in all things; for instance, "it would at the present day be absurd to declare a maritime usage to be legally fixed in a sense opposed to the continued assertion of both Great Britain and the United States."

The only point on which one could wish for a fuller exposition is the nature of the sanctions, or quasi-sanctions, of international law. This law consists to a great extent, as we may see by opening Mr.

Hall's book almost anywhere, of statements about what an independent nation *may* or *may not* do. What is the real meaning of this language? By writers who are content to take refuge in the principles of absolute right the question is of course neglected. To those who, like Mr. Hall, prefer to stand on the more solid, if more humble, ground of fact and experience, it should be of considerable importance. Most persons would say that the sanction by which the law of nations is enforced is war; in which may be included for this purpose isolated acts of force, reprisals, so-called pacific blockades, and the like, which are acts of war if the State against whom they are employed thinks fit to treat them as such. And the reflection is now a trite one that international law differs from laws proper in that the parties are judges in their own cause. Every Government must decide for itself whether the conduct of another independent Government is such as to make war necessary or comparatively desirable. Yet the books undertake to tell us in some detail that certain causes of war are just, and certain others are unjust; not, indeed, without a quiet but sufficiently clear indication from Mr. Hall of the amount of wool that the utmost ingenuity and enterprise of pig-shearers may be expected to produce in this kind. How can we speak of a war as legally unjust when there is no penalty save the risks of the war itself, which may turn out, for anything that can be pronounced beforehand, to the unjust combatant's advantage? If a majority of the Great Powers were ready and willing to act habitually in

concert for the purpose of restraining aggressions or provocations generally deemed unjust, that would be an effective sanction indeed. But we are yet far from this state of things. Mr. Kinglake has endeavoured, at the beginning of his *History of the Crimean War*, to show that an inchoate usage in this direction exists. We should be only too glad to believe that such is the case. But the usage described by Mr. Kinglake, if it does exist, is still unrecognized and undefined. It belongs to something which is to international law what morality is to laws proper. And this, by the way, may justify us in speaking of the law of nations as against extreme purists of the analytical school, who deny that it is really law. Since we find in the practice of nations that some duties are conceived of as positive, and others as only honourable, it is clear that here, as in the practice of individual men, the distinction between law and morality does exist, though it may be relatively undefined, and though the law may not possess all the characters of that which is so called as between a particular State and its subjects.

Again, belligerents are bound to respect the rights of neutrals; and these rights may be said in a true and intelligible sense to be sanctioned by war. For a belligerent who interferes beyond measure with a neutral's rights or interests exposes himself to having two enemies to do with instead of one—a danger which not even the strongest Power will care lightly to encounter. To this it is to be added that the interest of any one neutral is, in most cases, the

interest of all, so that the remoter but not insensible risk of an overwhelming coalition is present to keep the belligerents within bounds. But likewise there are laws of war conceived by publicists and statesmen to be binding on the belligerents as between themselves. Modern warfare is a state of "regulated violence," as Mr. Hall names it. And here we are not dealing with speculations in the air. There is no doubt that the violence of war has in fact been regulated and moderated to an extent that seemed impracticable in the time of Grotius. Whence comes the force of the regulation? The sanction of war is exhausted, for these rules become effective only when and so far as a state of war already exists. It may be said that the fear of retaliation or reprisals is a sanction. Where this comes into play, however, that which is for the time sanctioned is apt to be the stronger party's interpretation of the laws of war in his own favour, as was seen in the German invasion of France ten years ago. Moreover, reprisals and retaliation are available only to a limited extent, being, according to modern notions, too odious to be carried to extremities. In fact the grosser an offence is, the less is it capable of being punished in kind. Here, then, formal and tangible sanctions desert us. The "temperaments" of modern warfare, to use Grotius's term, rest in truth on an appeal to the common morality and humanity of civilized nations, which belligerents are presumed still to share, and in fact still do share to a great extent, even in the midst of active hostilities. It is consonant to the feelings of

civilized Governments, and in the long run to their interests, to observe towards one another in war some such rules as an enlightened neutral might wish to be observed for the sake of diminishing suffering and ill-will to the greatest extent compatible with the objects of war being attained. In other words, the sanction imposing on belligerents a certain observance of honour, humanity, and private rights, is at bottom the general opinion of civilized people. This is practically recognized by the manner in which belligerent Powers are accustomed to record their complaints of alleged infractions of the laws and usages of war. Such complaints can but seldom have the force of a specific threat; their object is to procure redress from the adversary's own sense of what is right, or, in default of this, to shame him into it by publicity. Should we not, then, regard public opinion as the final sanction of international law in every case,—a sanction with physical force behind it, no doubt, in one or another shape, but a force latent and undefined, and to be called into action only in an extreme case? This would bring out more clearly than the common view does the analogy between international law as governing the relations of States, and the rules of morality as governing those of individuals. Or a better parallel, perhaps, may be found in the customary rules of a patriarchal tribe, which are enforced by no specially organized authority, and in which morality and law are still imperfectly distinguished. The view here suggested is really implied in the statement made by various writers from Suarez downwards, though per-

haps with full distinctness by none before Austin, that the fear of provoking general hostility—not only that of the State particularly offended—is the ultimate compulsory motive for obedience to international rules. It seems to be a further consequence that war is analogous, not to the legal remedy of suing in a court of justice, but to the “self-help,” more or less regulated by custom, which has a considerable place in archaic legal systems, and of which surviving rudiments, reduced to a subordinate rank and fettered by new safeguards, may be found in the most polished ones. To pursue the comparison one step farther, some guide for speculation as to the possible development and strengthening of international law may be found in the historical circumstances of partly civilized communities. Probably in early Roman history, certainly in the middle ages, and notably in the Icelandic society described in the Sagas, private war went on for a considerable time side by side with legal redress before the supremacy of the law was finally made good. It is quite fair to object to the more ambitious schemes for European federation, universal tribunals of arbitration, and the like, that sovereign States would never consent to be bound by them. But it is idle to object to the more cautious proposals, such as Bluntschli’s, that they are not calculated, and do not profess, to make wars at once and for ever impossible.

It is time to return from our digression to Mr. Hall’s work. One of his greatest merits is lucid arrangement. He begins with a First Part of “General Principles,” corresponding pretty much to

the *Allgemeiner Theil* of systematic German writers, and giving a comprehensive view of the subject and its different branches. Then he takes up the divisions in detail. Under the head of "The law governing States in their normal relations," the rights and duties of sovereign States in time of peace are set forth. Here we have the doctrines of territorial dominion, sovereignty, the so-called "exterritoriality" of public vessels, extra-territorial jurisdiction, diplomatic agents, and treaties. This same exterritoriality is treated by Mr. Hall as a fiction needlessly introduced to explain anomalous immunities which are really to be accounted for on special grounds of necessity or convenience. The third part deals with "the law governing States in the relation of war," which includes, besides what are known as the laws of war, the rights of capture and levying contributions, the position of a military occupant, and the rules which determine the "enemy character" of property. The relations of neutral States to the belligerents are kept apart under the title of "the law governing States in the relation of neutrality," where, among other questions, the rules of contraband, blockade, and maritime visit and capture, are discussed. Mr. Hall's division of the subject is, we believe, new, though its convenience makes it seem obvious when once exhibited. His treatment of the matter in detail is, with few if any exceptions, as good as his method. He is careful to preserve the distinction between theory and usage, and among usages to distinguish those which are established from such as are still uncertain or in pro-

cess of formation ; for instance, the growing practice of restraining belligerents as much as possible from bringing their prizes into neutral harbours. In two or three places noted for criticism on the first reading of the book the doubt or objection is removed by subsequent explanations or additions ; and this perhaps is not a bad test of the general thoroughness of the work. The chapter on treaties might be improved by giving more attention to their operation in actually transferring dominion where the cession of territory enters into them. When such a treaty is executed, the parties are bound to its results not so much by the specific obligation of the treaty itself as by the general duty of nations to respect one another's territorial sovereignty. The analogous case in municipal law is that of a conveyance, not of a pure contract. Some of the language still commonly used implies a confusion which Mr. Hall might well have given a paragraph or two to clearing away. Treaties of this kind have been distinguished by some publicists from properly contractual treaties under the unhappily chosen name of "transitory conventions," and their effect has been still more unhappily expressed by the maxim that "transitory conventions are by the nature of the case perpetual." This is at best an extremely clumsy way of saying that the result is to create not an obligation but ownership. Proceeding from writers versed in Roman law, it is really past excuse. When a sale is complete the seller is bound to respect for an indefinite time the right of ownership acquired by the buyer, and it makes no difference if a lawsuit arises



between them about some other matter; but we do not say that the contract of sale is perpetual. On the question of "pacific blockade" Mr. Hall treats the authority of modern usage (six cases within twenty years) in a rather off-hand way. One must agree with him, however, that on principle it is an act of war or nothing. Finally, we may point to Mr. Hall's not infrequent criticism of the Continental writers as full of excellent and profitable instruction.

## II.

## LAWS OF NATURE AND LAWS OF MAN.

THE nature and extent of the analogy between laws in the strict or political sense, and the uniformities in the course of physical events which we call laws of nature, have often been discussed. Blackstone and earlier writers pressed the comparison with rhetorical inexactness, which has been rebuked by the later analytical school with some excess of severity, as if the likeness were merely verbal and misleading. Early in this century the correction was more modestly but not less effectually made by Blackstone's editor Christian. "In all cases," he says, "where it" (the word law) "is not applied to human conduct, it may be considered as a metaphor; and in every instance a more appropriate term may be found. . . . When we apply the word *law* to motion, matter, or the works of nature or of art, we shall find in every case that, with equal or greater propriety and perspicuity, we might have used the words *quality*, *property*, or *peculiarity*." Still the resemblance, notwithstanding all criticism, is a real one. The laws made by princes and rulers aim with more or less success, though never with perfect suc-

cess, at producing uniformity of conduct within the field of action to which they apply. We observe in the course of nature uniformities which are constant. This constancy, compared with the partial and uncertain obedience given to human ordinances, has in all times presented itself to men as the perfect fulfilment in another region of that which the lawgiver can only strive to attain. By laws we can, more or less, make men behave in particular ways; the constraints of express enactment or customary rules are sufficient to some extent, but not altogether, to determine their acts and forbearances. But the powers of nature always behave in the same ways, and this readily suggests to our mind a constraint which is always present and always efficient. Seed-time and harvest, the changes of the moon, the courses of the stars, come round without fail. Thus it would be with men's actions if the law were always obeyed, and therefore we seem to see in nature a law more perfect than man's because never broken. In some such way as this the phrase "laws of nature" has come into common use, and in the practice of modern writers almost any general proposition in any branch of science may be called a law. That this manner of speaking should come to be regarded as containing an explanation of the facts is but one of innumerable instances of the tyranny constantly usurped over man by his own creatures—words. But in following this track of resemblance we have introduced unawares an important difference. At first sight the laws of nature seem to differ from those of man only in being

inviolate; and their excellence in this respect is indeed a not uncommon topic of natural theology. But, when we consider it more curiously, the distinction is one of kind. The laws of nature are not more excellent than Acts of Parliament, but belong to another category. Christian has expressed the point as well as anybody: "When *law* is applied to any other object than man, it ceases to contain two of its essential ingredient ideas—namely, disobedience and punishment." A law of nature is obeyed, as we say, because there is no room for disobedience. In the case of laws in the proper sense, the law is one thing and the obedience—or, as it may be, disobedience—of any man subject to it is another thing: in the case of a law of nature there is no such difference. Human statutes, and even divine ones according to the majority of theologians, are commands addressed to agents who may or may not follow them. Their object is a certain uniformity, but the uniformity does not necessarily ensue. Nay, the law would still be a law if no single person obeyed it on any one occasion. But a law of nature is inseparable from uniformity; or rather it is the uniformity itself.

These considerations are such as by this time are pretty familiar to students of jurisprudence. Men of science have hitherto not troubled themselves much with the question, or at any rate have not added anything to the legal view of it. As to the attempts of philosophers who were neither men of science nor lawyers to clear up the general notion of law, they are best left in charitable silence. But lately Pro-

fessor Huxley, in his admirable introduction to Messrs. Macmillan and Co.'s series of *Science Primers*,<sup>1</sup> has brought a fresh and powerful scientific mind to bear upon this ancient comparison or metaphor, and shown once more that no subject is too worn to be put in some new light. His paragraph on "Laws of Nature" is quite short, and a considerable part of it may be given in his own words:—

When we have made out by careful and repeated observation that something is always the cause of a certain effect, or that certain events always take place in the same order, we speak of the truth thus discovered as a law of nature. Thus it is a law of nature that anything heavy falls to the ground if it is unsupported. . . . But it is desirable to remember that which is very often forgotten, that the laws of nature are not the causes of the order of nature, but only our way of stating as much as we have made out of that order. Stones do not fall to the ground in consequence of the law just stated, as people sometimes carelessly say; but the law is a way of asserting that which invariably happens when heavy bodies at the surface of the earth, stones among the rest, are free to move.

The laws of nature are, in fact, in this respect similar to the laws which men make for the guidance of their conduct towards one another. There are laws about the payment of taxes, and there are laws against stealing or murder. But the law is not the cause of a man's paying his taxes, nor is it the cause of his abstaining from theft or murder. The law is simply a statement of what will happen to a man if he does not pay his taxes, and if he commits theft or murder; and the cause of his paying his taxes or abstaining from crime (in the absence of any better motive) is the fear of consequences which is the effect of his belief in that statement. A law of man tells [us] what we may expect society will do under certain circumstances; and a law of

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<sup>1</sup> The title of the book is *Science Primers: Introductory*, which is an awkward one to quote.

nature tells us what we may expect natural objects will do under certain circumstances. Each contains information addressed to our intelligence, and, except so far as it influences our intelligence, it is merely so much sound or writing.

While there is this much analogy between human and natural laws, however, certain essential differences between the two must not be overlooked. Human law consists of commands addressed to voluntary agents, which they may obey or disobey; and the law is not rendered null and void by being broken. Natural laws, on the other hand, are not commands, but assertions respecting the invariable order of nature; and they remain laws only so long as they can be shown to express that order. To speak of the violation or the suspension of a law of nature is an absurdity. All that the phrase can really mean is that, under certain circumstances, the assertion contained in the law is not true; and the just conclusion is, not that the order of nature is interrupted, but that we have made a mistake in stating that order. A true natural law is an universal rule, and, as such, admits of no exceptions.

Professor Huxley, it will be seen, fully recognizes the difference insisted upon by Bentham and his followers in this country; and on that point we do not see how his exposition can be bettered. We can only rejoice that truths which down to our own time were ignored or imperfectly apprehended by the majority of learned men are now presented in clear, simple, and forcible language to every one who sets about acquiring even the rudiments of scientific training. There is some novelty, however, in the similarity between natural and political or civil laws, which is pointed out in the middle section of the passage we have quoted; and we may find here some matter for further reflection. Professor Huxley assigns uniformity of action as the common element in our conception of laws proper and of the so-called laws of

nature, but he assigns the uniformity of law properly so called to an unaccustomed place. He refers our impression of uniformity not to the effect of laws in so far as they are observed, but to that which happens if they are broken. Not in the action of the citizen who obeys, but in the action of the State which punishes the disobedient, we are to perceive the analogy to the certain and constant operations of nature. This is not only ingenious, but seems to fall in very well with the doctrine of our analytical school, which, as all students know, lays peculiar stress on the sanctions of positive law. Moreover, there is a considerable show of convenience for it. There is in any case no perfect uniformity to be discovered in human positive law. But on the common view the exceptional cases will be all cases of disobedience; on Professor Huxley's view they will be only those cases of disobedience which escape punishment. And thus there is a decided gain in the apparent closeness of the analogy.

But we have to consider how far it can be rightly said that "the law is simply a statement of what will happen to a man" if he disobeys it. And it is to be observed in the first place that, however true this may be for the analytical inquirer, it is not the manner in which the law is actually regarded for any practical purpose; except, perhaps, criminal law, which is not safely to be taken as the type of positive law in general. Honest men want, as a rule, to know enough of the law to conform to it in their dealings; but, inasmuch as they have no intention of breaking

it, do not want to know the exact consequences of a breach. Hence the historical account of the comparison which would be required by Professor Huxley's explanation seems less probable than that which we have given above. Further, the "statement of what will happen" is by no means a simple one, for its truth depends on several conditions. The sanction will take effect if the wrong and the wrongdoer are discovered, and if there is no miscarriage in any part of the proceedings, and if the law is honestly administered. And all these conditions are, or may be, material: the last of them, happily, need not be considered in England; but there are many countries where it is otherwise. In the last year or two we have been repeatedly told that many wholesome laws are nominally in force in Asia Minor, which only need to be put in real use to make the condition of the people, if not the best that might be, at least much better than it is. But then these laws are not statements of what will happen: they are statements of what does not happen, and was never seriously expected to happen by persons who knew the secrets of Turkish government. In the southern provinces of Russia the law presumably forbids Russians of the orthodox Greek persuasion to plunder, ravish, and murder their fellow-subjects, and not the less so that the sufferers may happen to be Jews. Yet the people of several Russian towns and villages have been doing all these things openly, as we hear, to their Jewish fellow-subjects: and we do not hear that the criminals have been punished, or that any serious



endeavour has been made to punish them. In our own country there have been many penal statutes which were not in any natural sense statements of what would happen to persons contravening them; for they have been habitually neglected and contravened to this day, and nothing whatever has happened to the transgressors. This is true even of some modern and apparently rational enactments, such as that against the conveyance of voters in boroughs. Again, it seems far-fetched to heighten the analogy between laws proper and laws of nature by saying that "the law is not the cause of a man's paying his taxes." Surely it is at least a *causa sine qua non*, for without it why should he pay them, or how could there be taxes to pay? To take a concrete instance, it seems not easy to deny that the Elementary Education Act—that is, the will of Parliament as expressed by the Act—is the cause of school boards being elected and of householders paying school rates.

No doubt law, so far as it takes effect by reason of its sanction, is effectual through the belief of the subject addressed that the threatened evil will follow in case of disobedience. But the belief or assertion that the threatened evil will follow is not the law itself: it is an inference from the law taken with its circumstances. In itself, the law is, from the assumed point of view, a command coupled with a threat. The probability that the rulers issuing it will make their threat good—which may depend on their power, or on their will, or both—must be ascertained by other means of information. Strictly the law tells us

only what the State professes that it will do ; and in well-governed commonwealths this will coincide, saving inevitable accidents, with “ what we may expect society will do.” But the two things are not identical. On the ground taken by Professor Huxley, the nearest counterpart to a law of nature in the scientific sense would seem to be, not the enactment or decree of a sovereign power in itself, but a statement of its contents (say in a collection of statutes, or in an exposition by a text-writer), coupled with the tacit assumption that the law can and will be enforced. Again, the amount of uniformity which is actually presented by the working of human laws depends in great measure on something not immediately connected either with the character of those laws as commands, or with the punishments denounced on men who disobey them. We mean the following of precedent. This is a mark of law which is perhaps as important as any.

We should hardly give the name of law to a series of unrelated and inconsistent commands, enforced by arbitrary and uncertain methods, although their subject-matter might be the same as that of the kind of laws we are used to. The capricious orders of a crazy despot may be laws according to Austin’s definition until they are revoked ; but if so, it is the worse for the definition. In any case the law of civilized countries, as we now find it, is to a great extent founded on precedent. In the English system, which prevails, with few exceptions, throughout the British dominions and the United States, the precedents are furnished by the recorded decisions of judges

on questions which have occurred in actual litigation. In the system of the Roman law, which prevails on the Continent of Europe and in the settlements and possessions of Continental Powers, the precedents consist of the opinions of distinguished lawyers and text-writers on questions which may or may not have come before them in a practical way; to which, according to the modern practice of several countries, judicial decisions are added, but not so as to have any greater authority than the best opinions. The differences between the two systems are important; but at present we are not concerned to pursue them. They agree, however, in this, that they look for guidance in new difficulties to the treatment of similar difficulties in past times. The manner and degree of their observance of precedent are diverse; the general character is the same. And it is an observance also largely met with in those parts of the conduct of life which have a formal and quasi-legal character, such as the proceedings of legislative and executive bodies, public meetings, and committees. Of actual ceremonies we say nothing, as their history is distinct. In modern times they have mostly become parts of some order or discipline which is directly or indirectly under the sanction of positive law; and then the necessity of observing them is for the persons concerned simply the necessity of obeying the law. But ceremonies are doubtless earlier than any laws, and the influence of ceremonial ideas and habits on ancient law is a subject of which the importance is already apparent, and on which there is probably still much

to be learnt. So long and in so far as ceremonies exist independently of law, their safeguard is the supposed necessity of performing them exactly at all points in order to obtain a desired benefit or avert a dreaded misfortune.

At this day the regard for precedent which pervades not only the law itself, but every department of life that has become coloured by legal ideas, appears to us a thing requiring explanation. And very fair and reasonable explanations are forthcoming. Not to neglect the results of our predecessors' experience in a like matter is easily admitted as the plainest counsel of common sense. Nor is it difficult to see the advantage of applying this most general rule with a certain artificial nicety for particular purposes. Other things being equal, that conclusion is most probable which has been arrived at upon the fullest discussion and ripest consideration. Thus the decision of three or four judges, after careful argument and time taken to prepare the judgment, is manifestly of more weight (assuming no great disparity of abilities) than that of a single judge who has to make up his mind on the spot. Hence the gradation of authority in our English system of judicial precedents may be rationally as well as practically justified. And on most questions affecting action we feel that the judgment of a competent and adequately informed person on a question of the same or a like kind is a considerable help to shaping our own course. This is in part, perhaps, because the reasons and motives of conduct in any but the simplest affairs can

but seldom be fully expressed ; so that there is really more to be learnt from a prudent man's actions than from the reasons he or any one else can give for them. This and much more is to be said for respect for precedent on the ground of reasonableness.

Then on the ground of convenience there are divers arguments of weight. If it is known that a decision once arrived at will be followed in the like case in time to come, the uncertainty of men's affairs is diminished, and occasions of dispute taken away. The same questions must not be agitated for ever : *interest rei publicae ut sit finis litium* is a good maxim for standing causes of litigation as well as for every lawsuit in particular. And on this head also it would be easy but superfluous to enlarge. There is yet another ground of convenience which may seem at first sight of small account, but which is greater than it seems. Two sorts of cases present much difficulty of choosing on principle what to do : those where the choice is between two or more ways of doing the same thing which are in themselves indifferent, and those where the question of substance is such that no perfectly reasonable solution seems attainable. The rule of the road may be taken as an example of the first class ; the treatment of contracts concluded by correspondence as an example of the second. Yet something has to be done ; and, the choice being once made, it becomes natural for the saving of trouble and perplexity to do the same thing, or as nearly as may be, when a similar case recurs. The fact of having taken a particular course once will of itself

determine a certain tendency to follow it again if the conditions are repeated. In the same way the experience of a thing having been done by others will, on a renewal of the circumstances, give rise to a certain expectation of its being done again. This is a general fact of human nature, included by psychologists in the statement of what is called the law of association. Thus a single instance makes a precedent, and the precedent tends to confirm itself by repetition.

It seems not unlikely that this is the manner in which the ideas of precedent and custom are originally formed. What has been done once is done again, not because it seems the best thing to do, but because there is an unreasoning tendency to do it, which in the absence of other and stronger motives will prevail. The more often it is done the stronger will be the expectation of its being done yet again on the next occasion, and this will at length become a sense of necessity. No words are needed to prove that even the most freethinking of mankind are to a great extent the slaves of habit; and ancient customs and customary laws are a special kind of habit produced in times and circumstances excluding reflection and criticism. Nevertheless men begin to ask for at least the show of reasons at a very early stage of social growth; and a merely verbal show being in those stages enough, the thing is readily made to explain itself. A man ignorant of the arts of exact reasoning, and feeling in himself the impulse to do what he has done before, need have no difficulty in accepting as

the sufficient foundation of a custom the fact that it is accustomed. It is the familiar and natural thing, therefore necessary and right. "Our fathers have always done so," is the standing reply to the inquiries of astonished travellers, or of the bolder minds which may appear in the tribe itself. And it may well seem conclusive to a mind which has not learnt to distinguish the expectation that the future will resemble the past from the use of experience as a guide to deliberate action. The *will* or *ought* of natural sequence is confounded by this untutored contemplation with the *ought* of rational conduct and ethical duty.

Another point is to be noted in the psychology of custom, which may be of some importance. We think of customs as established by long use, and in a lawyer's idea of custom this is a vital element. But this is because we have learnt how great are the dangers of error if we conclude from solitary or few instances either as to relations of cause and effect or as to the convenience of a particular course of action. There is no reason to suppose that when society was in its infancy mankind were troubled with any such scruples. If we may draw inferences from the childhood of the individual to that of the race, one or two instances probably sufficed to make a good custom for our prehistoric ancestors. It is notorious that young children will appeal to precedent in support of their requests almost as soon as they can frame a coherent sentence. They will allege, if they can, the leave of a competent authority as already had, as by offering

such a plea as "Mamma lets me do it" to a father's prohibition of sports threatening danger to the child or destruction to furniture. But if the authority referred to turns out (as generally happens) not to support the argument, the child's artless cunning falls back on the defence of bare precedent. "One day I did it," or words to that effect, are brought out with an air of perfect seriousness and confidence; and, though the plea is overruled, it is at least doubtful whether the pleader is intellectually satisfied. It may be suspected that we have in these involuntary revelations of infant logic the true primitive form of the universal argument of archaic conservatism. "One day I did it" is the simple and undisguised statement of the mental process more plausibly expressed by children of larger growth in the shape of "our fathers have always done so." The child is father of the man in more ways than have yet been observed with adequate care; and the study of children's ways and language has not improbably a considerable part before it in the psychological researches of the near future. In connexion with the subject now under our view it would be interesting to note the earliest age at which the sense of justice becomes distinct. We mean not merely the sense of rightness or wrongness in particular actions, which may be acquired in very tender years, but the conception of a constant and even rule to be applied without respect of persons. Much will depend on the training and example given by parents. A child weakly and capriciously dealt with must be slower in forming the notions of right



and justice than one brought up in a firm and equal discipline ; and the belief that justice is due to children as well as to adults is still, unhappily, far from universal. But we suspect that even under the most favourable circumstances the idea of justice, in the specific and proper sense, is of relatively tardy growth.

Now, turning back to the consideration of what are called laws of nature, we may observe that nature presents to us, even more than the image of command always obeyed, that of precedent invariably followed. The analogy to human laws in their modern or statutory sense, as express commands prescribing particular things to be done, is the product of a rather advanced stage of reflection. Whatever its value may be (and I am free to confess that I do not rate it highly), it is artificial. The analogy to human law in its ancient or customary form is both closer and more obvious. And to early observers the uniformity of nature, so far as it was ascertainable with their means of observation, would in no way seem to be in contrast with human conduct, such as it was or ought to have been according to the standards of conduct they were familiar with, but would rather offer a singular harmony with it. Anthropomorphic interpretations of the common phenomena of nature would seem not less but more probable by reason of the phenomena being periodic and fairly constant. The works of man's hands wait upon the seasons of the year, and are fulfilled with their due and accustomed ceremonies ; and man, looking out from himself into the world, finds custom and solemnity in the

world and the seasons themselves, and carries them into his early speculations on the unseen rulers of the world. Whoever reads Homer with his eyes open will find that the Gods on Olympus are ruled by custom and prescription almost as much as the host of the Achaians before Troy. Zeus is the father and master of the house ; his might is boundless, or almost boundless ; but there are bonds which even he must not break. It is not that the power fails him. He is tempted to break the fate of his son Sarpedon, but he is restrained by Hera's rebuke. The deed might be done, but would be lawless and of dangerous example. And as they are capable of communion and kindred with mortals, the Gods also have their share in men's custom and law. Poseidon takes up the feud of his son Polyphemus against Odysseus, and as between the Gods themselves Ares owes the adulterer's fine, or rather ransom, to Hephaistos, and is released only when Poseidon becomes surety for him. They are the protectors of human justice, too, and Zeus sends the great rain-floods in his wrath when men of violence sit in the marketplace and judge crooked judgment, not regarding the word of the Gods.<sup>1</sup> But they are not the authors of justice and law ; the rules guarded by their power are *their* laws only in the same sense as, in the theory of English legal writers, the immemorial common law which the king's courts administer is the king's law. To a Greek mind in the Homeric age, and probably much later, the reign of law was the same, or nearly the same, in nature and

<sup>1</sup> Il. xvi. 386.

in man. On the one hand the course of nature was transfigured by anthropomorphic imagination; on the other hand the freedom of human action itself was but slight in comparison with the bond of custom and the universal constraint of fate, beyond the Gods themselves, which formed the mysterious background of the universe. The clear separation of the laws of nature from the laws of man was reserved for a time when many more generations had received the discipline of science and philosophy. We who are in possession of the modern analysis shall do much amiss if, like some of its expounders, we despise our fathers for not having known better.

## III.

SOME DEFECTS OF OUR COMMERCIAL  
LAW.

## I. INVOLUNTARY LEGISLATION.

WHO makes the laws of England? The question seems an elementary one, and most people would be ready to answer off-hand,—the Queen, Lords, and Commons. Those who at any time in the course of their studies have entered into the labours of Bentham and Austin may consider the matter more deeply, and answer that Parliament indeed makes law, but the judges make it—and sometimes unmake it—also. But we are not yet at the root of things. The judges are *causa proxima* of the law settled by their decisions, but not *causa efficiens*. They cannot lay down anything of their own motion. A judge may write a legal book; but, however much better it may be than another man's book, it is equally powerless to make a binding rule for future decisions. The Courts can expound the law with authority only upon the occasions given to them when the judicial machinery is properly set in motion. So then we may say that as cloth is made by the weaver, though the machinery of the loom is beyond his comprehension,

the part of our law which we call "judge-made" is really made by the people who start and keep going the processes of litigation. These people, it is needless to say, are the suitors. It is also needless to say that the declaration and amendment of the law, so far as it is effected by judicial decisions, is effected at the suitors' expense. The weaver is paid for making cloth, but the suitor pays for making law. So far as this expense enures to the benefit of the public by making the law more certain, it might seem that the suitors are unjustly charged with it. A man may well think it hard to be first led into difficulties by the imperfection of the law, and then made to pay for mending it. For these and other reasons certain benevolent persons have proposed that the State should pay the costs. This, however, is open to various objections. Besides such obvious ones as the danger there might be in the temptation of going to law at our neighbours' expense, there is the reflection that to call in the State here is to call it in at the wrong end. We should make the public pay extravagantly for results that might have been far better and more cheaply secured by other methods. The State can and ought to do something for the relief of suitors, not by relieving particular suitors from the consequences of litigation, but by diminishing the necessities for litigation arising. This appears a commonplace proposition, yet it is certain that it is by no means generally appreciated.

An ancient traveller relates that in a certain land of the Ethiopians there was a much frequented high-

way, parts of which were smooth and firm, others broken and full of holes, or encumbered with heaps of stones. And he marvelled much at the fashion of the road, all men using it for their occasions to and fro, and the land being in no wise barbarous, but full of wealth, and not lacking discreet men. So he looked more narrowly, and perceived the custom of the highway to be such, that when a man fell in one of the holes he must call the watch to help him out and make the road good. Which being done, and having paid the watch for their pains, he would go on his way rejoicing (as best he might, for they often had shrewd knocks), that in time to come no other man would fall into the same hole, at least not the self-same way. But where the road was exceeding broken, and there were many that fell and cried out, there would come with no little ado the *posse comitatus*, or so many of them as could be spared from bear-baiting, ringing swine, and other weighty matters, and would go to work to mend it; yet in such sort that, being in haste, and for the most part but middling workmen, casting in stones and rubbish without order, a shovelful here and a barrowful there, it was an even chance but they did mar as much as they mended. So that the traveller fell again to marvelling, not that the road was not better, but that any part of it was not worse. Then he spoke with certain of the ancient men, and finding them wise and of civil conversation, said that in his poor judgment it should be to the great relief of the wayfarers' estate, and the saving of many grievous losses and hurts and spoiling of good

men and cattle, if order were taken once for all to repair and keep repaired the common highway at the common charges of the inhabitants; which, moreover, was no new device, but a thing already seen and approved for the good effect thereof in most nations of any repute for policy and government. But the men were amazed at his discourse, and took it much amiss, protesting that such new-fangled schemes were clean against all their experience and practice, extravagant in cost, and, for aught that appeared, ruinous in consequence; the undertaking too great for any man's skill, and the end beyond any man's foresight; whereas, the matter standing as it did, they were sure at least of this, that the road would be mended where it most needed mending.

The people of England—and especially men of business—inhabiting a country second to none in power and resources of every kind, yet walk every day on a road strewn with open pitfalls, which remain open merely because it is nobody's business, until the mischief is done, to see that they are filled up. The security of the commonest transactions of life, much more of the vast and complex operations of commerce, rests ultimately on the civil law. The interests involved are assuredly not less in England than elsewhere. Yet England is the one country in Western Europe where it is most difficult for a man who is not a lawyer by profession to have any clear notion of the laws he lives under, and where the chances are greatest that matters of serious importance will turn out to be provided for inadequately or not at all. It is quite

possible, but hardly relevant to our present necessities, to give an historical explanation of the manner in which this state of things arose and has been continued. A question of more practical importance is how it comes to pass that our existing condition is after all so tolerable as it is. That we do bear with it very patiently there is no doubt; for few tasks have been found less hopeful by those who have tried it than to awaken any strong general interest in plans of systematic law reform.

The reasons for this are various. In the first place, the evil is one that does not touch the bulk of the middle classes. The common run of litigation involves no doubtful law; much of it does not even involve any dispute of facts. More than half the actions brought in the Common Law Divisions are not defended at all, and those which run their full course to trial are but a fraction of the remnant. It is but a fraction of these, again, which come before the judges on points of law. Thus the grievance arising from the cumbrous, confused, and unorganized condition of our laws is not one of those which are felt as a galling pressure widely spread over the commonwealth, and are shaken off by popular indignation. When it does strike it strikes heavily, but the strokes fall now and then and here and there, and there is nothing to fix public attention that way. Some conspicuous case of hardship may make a stir for a while, but it passes off and little or nothing is done. Again, the merits of our legal system, or rather of those who administer it, do much to hide its



defects; the excellence of the workmen prevents us from seeing how faulty the tools are. English judges, after making all allowance for narrowness in technical matters, have, as a rule, been men of strong common sense, anxious to do substantial justice, and to give intelligible reasons for it. Even the social, economical, and political prejudices which have often influenced their judgments have been prejudices common to the great bulk of the educated men of their time. Hence it was natural that the common law which these picked Englishmen professed to expound, but really made in the expounding, came to be regarded as something peculiarly English, and providentially fitted to the needs of this country not only in its substance but in its form. The conditions in spite of which such good results could be produced have arrogated to themselves the merit of producing them. Besides, the standing fiction of case-law probably imposes on the public no less than it did until quite recently upon judges and lawyers themselves. An unsettled point of importance is raised, argued, and decided. The decision commends itself to intelligent men familiar with the subject-matter as just and reasonable. They praise the law which has been declared, but forget that it has in truth been newly made at the expense of the suitors, when it might as well or better have been made beforehand.

Not that every possible case can be specifically provided for beforehand. That would require an infinite foresight to conceive it, a language of super-human exactness to express it, and unlimited space to

set it forth. But it is none the less possible to lay down clearly and in a moderate compass the general rules which are to govern classes of cases. If we got clear and authentic general rules by our present method, the hardship to the parties immediately concerned might perhaps be disregarded. But this is just what we do not get, except by a windfall. A few splendid opportunities may present themselves to a judge who, like Lord Westbury, for example, combines width of grasp with great logical powers; but such is not the usual course of things. In the natural growth of our case-law the ground is covered by degrees with a series of decisions on minor points which nibble, as it were, all round the edges of a large question. The process goes on till some day it is discovered that the combination of all these detached operations gives a total result which was not fairly contemplated in any of them,—sometimes one which nobody would think of approving, if the field were still open. Often there is a long time of suspense, during which it is impossible to say with any certainty what the result will be. The completion of any particular branch of the law depends, in short, on the chances of litigation. The litigants who thus play the part of involuntary legislators know little of the honour thrust on them, and certainly set no store by it. Suitors do not refuse compromises, or prosecute doubtful appeals, in order to settle vexed questions for the public good.

## II. ANOMALIES OF LEGAL DEVELOPMENT.

Few persons who have not made a special study of the law can have any notion of the wonderfully uneven manner in which its growth has proceeded. Law being made in this country mostly through litigation, the casual exigencies of litigation determine what parts of it shall be filled up and what left incomplete. The fabric of English jurisprudence presents to the legal mind's eye a view not unlike the visible fabric of the new Law Courts a year or two ago—here pinnacles receiving the last touch, there walls only rising from the ground. And, what is still more curious, the gaps are by no means confined to the places where one would expect them. An admirer of case-law as opposed to systematic legislation might prophesy beforehand that the natural growth of law-suits in the commonwealth would be accompanied by a process of natural selection, whereby just those points would arise for decision which the convenience of the public then and there required to be decided. The imperfect foresight of a legislator, it may be said, will provide for superfluities and omit necessities; the spontaneous working of judicial institutions will provide for just the right things and in just the right way. It is needless to enter on a theoretical examination of these expectations, for it is quite certain that they are not fulfilled. All kinds of curious little questions receive elaborate answers, while great ones remain in a provoking state of uncertainty. Cases which seem about to settle a grave doubt once for all

take an unexpected turn and go off, perhaps, on a minute point of practice. Nor is this all. It is the custom of legal text-writers, and to some extent even of judges, to disguise as much as possible the existence of really doubtful matters in the law: there are set phrases and turns of speech which mark to the accustomed reader—but to him only—where the firm ground leaves off. So that altogether the state of laymen wishing to ascertain their rights even in affairs which look as if they ought to be simple is not a little perplexing.

The sale of goods is one of the commonest transactions of life. It might seem not very rash to guess that the law relating to this transaction is eminently clear and well settled. Such a guess, however, would be wide of the truth. Let us take a case neither complicated in itself nor unreasonably remote from ordinary experience. Goods are sold on credit, and remain in the seller's possession, the buyer undertaking to remove and pay for them at a certain date. The time of credit expires, and the buyer makes default. What is the seller to do? Surely this is a question which one might expect a civilized system of law not to leave in doubt. But, in fact, it "is one on which the law is more unsettled than any person not practically acquainted with the subject could anticipate." So Lord Blackburn wrote more than thirty years ago, and his words are to this day as true as they were then. It may be considered certain that the unpaid vendor is not bound to deliver the goods without payment. It is also certain that he is not entitled (as

he is in some other countries) to rescind the contract and hold the goods as owner. One rational course seems to be left,—to resell them at the defaulting buyer's risk. Some fifty years ago the Court of Common Pleas expressed a strong opinion, but was not called upon to decide, that the vendor had this right; and if the point had then happened to arise for actual decision, it would no doubt have been settled in accordance with justice and convenience. But, as things fell out, it was left open, and the Court of Queen's Bench decided in 1851, and again in 1859, that the unpaid vendor has no such right. According to these decisions, not only must he account to the buyer for the profit, if any, on a re-sale, but the act of re-sale itself is a breach of contract for which he is liable to an action, though, if there is no profit, the damages will be nominal. Nominal damages, however, may be accompanied by very real costs. Is this the end of the tale? Not yet: about fifteen years ago the Judicial Committee suggested that if the seller gives express notice to the buyer of his intention to re-sell if the goods are not removed and paid for, he may perhaps not be liable to an action. The force of this remark, again, must be tempered by the reflection that the opinions and even the judgments of the Privy Council, though deserving of great consideration, are not actually binding on the Supreme Court in England. Only the House of Lords can speak to English Courts with canonical authority. The wisdom of the Judicial Committee is good for example of life and instruction of manners, but it may fail the English suitor at a

pinch. This distinction was not long ago illustrated by a case where the Court of Appeal deliberately refused to follow a ruling of the Judicial Committee admitted to be precisely in point.

Now take another question, still from the sale of goods, which is also neither of a recondite kind nor unlikely to occur in practice. Is the seller of specific goods deemed, in the absence of express assertion that the goods are his own, to warrant to the buyer that he has a good title to them? Various old and modern authors—including Coke, who, by inveterate superstition, is regarded as all but infallible—say there is no warranty. Of late years, however, it has been discovered that there is no actual decision to that effect to be found in any book, and the law assumed by most text-writers has had grave doubts cast upon it. One Chief Justice of England has said that the admitted exceptions well nigh eat up the rule; one Chief Justice of the Common Pleas has very nearly, but not quite, denied in set terms that any such rule exists; while a few years afterwards his successor acted upon the rule as still existing. During the last ten or twelve years nothing has occurred to throw any fresh light upon the point, and thus we have ample leisure to watch the law in a state of transition, and meditate on the resulting convenience to the commercial world.

Such is the fashion in which the law of England grows when it is left to itself. In British India, where they have not time to enjoy these refined pleasures, they have enacted a new-fangled thing

called a Contract Act, which contains, among other matters, a chapter on the sale of goods, disposing of the foregoing questions, and many others, in some fifty paragraphs. The whole is expressed in language which, without being loose or inaccurate, is perfectly intelligible to any educated man who will take the same trouble to understand it that he does in his own affairs to understand letters or documents which concern him. The Anglo-Indian codes are the work of Englishmen, and founded on English law; the Contract Act, I believe, was mostly composed in England. We are told, however, that what Englishmen have done with success for British India they are incapable of doing for themselves. Codes are only fit for the coarse methods of a rough and ready government administered by civilians, and we do not understand our own blessings. Our adversary may be certainly wrong according to morality and the customs of business, and probably wrong in law; but if our purse and patience are limited we shall do well to agree with him at an early stage, comforting ourselves with the possibility that some more enterprising suitor may extract from the House of Lords, ten or twenty years hence, an authentic, conclusive, and thrice refined exposition of what would have been our proper course if we had known, as every Englishman is presumed to know, the laws of our country.

### III. CAPRICES OF LEGAL DEVELOPMENT.

Nature loves variety, and the growth of English law, left as it has been to the natural course of litiga-

tion, is full of varied surprises. So far as the ways of nature are thus manifested, she is by no means prodigal in finding distinct answers for questions of practical importance. But her courses are no less precipitate in some directions than they are dilatory in others. There are points not intricate in themselves, and demanding rather to be settled one way or another than to be settled in the best conceivable way, which are still the subject of lengthened and indecisive discussion. There are others of the most delicate kind, and requiring the most careful balancing of different interests, which have been decided not only without adequate discussion, but without any rational discussion at all. One of the vexed topics of commercial law, or rather of general law specially interesting to men of business, is that of contracts by correspondence. When an offer is made and accepted by post or telegraph, from what point of time is each party bound? This may, perhaps, be fairly considered one of the questions to which it is more important to have some definite answer than to have the best possible answer. We do not believe, indeed, that in this case it is impossible to find a solution which is just, convenient, and complete; in fact, the thing is done in the Indian Contract Act. However, the natural evolution of our domestic jurisprudence has been making an answer, with more or less consistency of approximation, at various times in the course of the present century, and has at last settled it by a sort of rule of thumb, and against a protest delivered by Lord Justice Bramwell, of whom we are



yet hardly accustomed to speak as Lord Bramwell in one of his most vigorous and closely-reasoned judgments. Even as things now stand, it is uncertain whether a man who has accepted an offer by letter can or cannot revoke his acceptance by telegraph; in other words, whether a revocation dispatched after the acceptance, but reaching the other party first, is or is not effectual. The reasoning used in most of the cases points to the conclusion, repugnant as it seems to the common sense and convenience of mankind, that such a revocation cannot take effect. This is a singularly good example of the kind of difficulty before which case-law, and advisers with nothing but case-law to guide them, may stand helpless for years together. Results of the same kind have been produced in various departments of the law of property by the excessive subtilities and refinements forced upon it, sometimes in the teeth of positive legislation, by the Court of Chancery. The old scholastic pedantry of the common law was bad enough, but it had the merit of being definite. Courts of Equity, in their attempts to do perfect justice, have produced a system far more rational in principle than that of the common law, and far more minute and comprehensive; but it is also no less artificial, and in recent times has become so overweighted with its own growth that its working is cumbrous and uncertain. The subject is too technical to enter upon here in any detail. But it is well known that a vast amount of property in England, both moveable and immoveable, is held by trustees under wills and settlements, and

accordingly the beneficial ownership of all this property consists in what are called equitable as distinguished from legal interests. It is obviously of some importance that third persons should know how far they may safely deal with the nominal owners of land or investments, and how far they are bound to inquire into the existence of equitable interests which it is not always easy to discover. Questions of a similar kind arise in the frequent case of property being subject to successive incumbrances. The doctrines of equity, however, are still refining themselves, and every new refinement, broadly speaking, tends to increase the perils of purchasers. Add to this that the law of property is of interest to all men and women who have any property worth considering, and ought, therefore, more than any other branch of the civil law, to be plain, direct, and intelligible. It is, in fact, so intricate and confused that not only no layman can understand it, but it is all but impossible even for the experts who do understand it to translate it as it stands into anything like plain English. It must be said, however, that the Court of Appeal has been working hard of late years to bring equity more into accordance with common sense.

Let us now find an example or two of the other sort, where justice takes a leap in the dark. The peculiar and harsh rule of English law that freight cannot be apportioned was established without anything like sufficient consideration, but is now so firmly settled that in our own time some of our strongest judges have resigned themselves to enforcing it under

protest. The still harsher and more anomalous rule that a payment made in advance on account of freight cannot be recovered back if the goods are lost, and no freight becomes payable, is derived from an anonymous and "ill-digested case" (as Lord Chief Justice Cockburn called it) decided in 1683. This "somewhat scanty spring," in the words of another judge, has given rise to a current of authority too strong to be resisted—probably too strong even for the House of Lords to withstand; and thus we are saddled with a doctrine which puts us at variance with the rest of the commercial world, including the United States, and for which nobody has a good word on its merits. Again, the bankruptcy of a firm of partners raises questions of great difficulty and importance as to the manner in which their property is to be distributed among the creditors of the firm in the partnership business and the private creditors of the partners in their separate affairs. There are two sets of persons claiming in different rights,—the creditors of the firm and those of the individual partners; there are two funds to be distributed as far as they will go,—the property of the firm and the separate property of the partners. What relation is to be established between the two classes of creditors and the available funds, so as to work out the least unsatisfactory result? The importance of these questions is self-evident; their difficulty sufficiently appears from the fact that no two systems of law seem to deal with them in exactly the same way, while the mercantile scheme of administration in such a case is different from any legal one with

which we are acquainted. There is one rule in England, another in Scotland, one or more others in France,—for the Codes are silent, opinions not unanimous, and practice not uniform,—and others again in Germany. We are not here concerned to inquire which of these rules is the best in itself, nor therefore to enter into the description of any of them, but only to observe how the English rule came to be established. It was laid down early in the last century, when the principles of partnership law were still very imperfectly understood, and with so little consideration that no connected statement of reasons for it is given in any book of authority, and two or three eminent judges, though not dissenting from the rule itself, or suggesting any other in its stead, have confessed that it is extremely difficult to find any. Story, the great American judge and jurist, who was usually very mild in his observations on settled rules, criticized this one in unsparing language, and pronounced its foundation to be most questionable and unsatisfactory. An historical explanation is not very difficult. The problem arose at an early stage in the growth of our modern commercial law, and it was obviously necessary to deal with it; this much was perceived, but the delicacy of the task was overlooked. It is a well-known feature of legislation in its cruder stages to rush at undertakings which modern statesmen touch only with the greatest anxiety and reluctance; and the same is true, in a measure, of judicial law-making. So, in this case, the solution provided was of the roughest kind, and sadly wanting in that flexible adaptation and precise

refinement of justice which, we have been taught to believe, distinguishes the pure products of case-law from the coarse efforts of law-givers. Thus our method of law-making on occasion rather than on system is seen to break down at the very points where most merit is claimed for it. The natural course of decisions provoked by litigation cannot be trusted either to furnish us within any reasonable time with distinct rules for men of business to guide their conduct by in affairs of importance, nor, when it does produce such rules, to produce them with sufficient deliberation or consistency. The first of these drawbacks is to a great extent inherent in the nature of case-law, and the remedy for it belongs to the province of legislation. The second is largely mitigated by some peculiarities of our legal institutions, and might theoretically be made to disappear. But were it not for the continuous traditions and education of the legal profession, the limited number of tribunals whose decisions are considered to lay down the law, and the subjection of all these to one ultimate court of appeal, not only would the omissions of case-law be perplexing, but its caprices might speedily become intolerable.

#### IV.—DESULTORY LEGISLATION.

The institution of law-making by the results of casual litigation having been found from early times to be in various ways insufficient and even inconvenient, the wisdom of Parliament has been from time to time exercised in providing remedies for its defects. The general intention of these measures, if

we except the cases of distinctly unjust laws passed in moments of social panic, has been for the most part good. Unfortunately it is a discovery of very modern date that there is such a thing as method in legislation itself, apart from the substantial merits of particular enactments. So far as concerns the form of the law, the action of Parliament has given us, instead of undigested case-law alone, a mixture of undigested case-law with no less undigested statutes, the mutual bearings of which it is often very difficult to perceive.

In order to legislate in a satisfactory manner upon any given subject, several qualifications are necessary in the law-giver. In the first place, he must know accurately what the existing law on that subject is. He must be no less clearly aware in what respects he is not content with it, and why. He must further have formed a clear conception of the changes in its effect which he wishes to produce. Nor is it enough to have a distinct intention founded on exact knowledge. The law-giver must also have the skill to express that intention in apt, sufficient, and unambiguous terms, which shall make his purpose plainly understood, if possible, by those who have to obey the law, but in any case by those who have to administer it. Parliamentary legislation, however, is carried on, with rare exceptions, under circumstances and in a manner which effectually prevent most or all of these conditions from being satisfied. The difficulty of knowing the actual state of the law is on many questions considerable even for experts, and most laymen

do not so much as know how great the difficulty is. Hence well-meaning and otherwise well-informed men often bring forward proposals which they suppose to be improvements of the law, and which might be so if the existing law were such as they suppose it to be, but which, in truth, are either superfluous or inappropriate. It is likewise a common state of mind, even among educated persons, to have a sense of dissatisfaction or hardship without attempting to fix in one's mind the real point where things are amiss. And this vague feeling that something must be done, somebody indemnified, or somebody else made answerable, is a constant force tending to unconsidered legislation. When our crudely formed and more crudely executed intentions fail to bear fruit, as they naturally do, we are apt to think, not that we have legislated badly, but that we have not legislated enough, and so blunders raise up blunders, and the stock increases and multiplies. Technical skill, again, is often below the mark, if not altogether wanting, especially in the amendments which may seriously disfigure the most artistically drawn Bill. In fact, the more artistic the original composition is, the more it will suffer from piecemeal alterations. The kind of skill required includes many elements. First comes power of expressing ideas clearly, which is not so common as many people think. Familiarity with the appropriate technical terms is of course needful, and besides this there should be knowledge of the manner in which the language of statutes is looked at by those who have to interpret it. There must yet be added the

faculty of scientific imagination which can foresee the various consequences of a proposed enactment in its relations to the various persons and transactions affected by it. We shall offer no insult to the intelligence of members of Parliament in saying that most of them are without these special qualifications. Nor is there any expert or set of experts whose business it is to guide or superintend the technical part of legislation. The result is that Acts and clauses are passed to which it is all but impossible to attach a definite meaning, which produce unexpected and absurd consequences, or which, being intended to settle doubtful points, only raise up new doubts in addition to the old ones. Many an Act of Parliament, originally prepared with the greatest care and skill, and introduced under the most favourable circumstances, does not become law till it has been made a thing of shreds and patches hardly recognizable by its author, and to any one with an eye for the clothing of ideas in comely words no less ludicrous an object than the ragged pilgrims described by Bunyan:—“They go not uprightly, but all awry with their feet; one shoe goes inward, another outward, and their hosen out behind; there a rag and there a rent, to the disparagement of their Lord.”

The section of the Companies Act, 1867, which was the theme of so much all but barren discussion in the case of *Twycross v. Grant*, is a fair instance of the dangers we are liable to in this way. The Act itself, as a whole, is a deliberately framed supplement to the principal Act of 1862. But its unhappy 38th section



was somehow foisted in while the Bill was passing through Committee, and in an evil hour was accepted by the Government of the day. It has all the marks of hasty amateur legislation; it attempts to be comprehensive by being vague, and succeeds only in saying so far too much that nobody can tell how much it really means. It would be easier to tell how much it has cost. The persons concerned in the case of *Twycross v. Grant* could probably give us an approximate estimate of the fruitless expense, simply in hard cash, which may be set down to the insertion of this one ill-penned clause.

The persons, however, who most keenly feel the difficulties and dangers arising from the fragmentary composition of our modern statute law are the judges. Their complaints on the subject have been many and bitter, and with reason. It is not too much to say that they often find themselves placed by the action of Parliament in the position of having to interpret the law by mere guess-work. Their task, as Lord O'Hagan once said, "sometimes involves the necessity of harmonizing apparently inconsistent clauses," and making sense of "provisions cast together haphazard by different minds differently constituted, and looking to different and special objects without due regard to the harmony of the whole." Well might that noble and learned person express in his judicial capacity the wish for a department "by which Bills, after they pass Committee, might be supervised and put into intelligible and working order." But the chance of Lord O'Hagan being able, in his legislative capacity, to

assist in the carrying out of any such plan appears to be as remote as ever.

It is further to be noted that the vagueness of case-law and the discontinuity of statute-law constantly react upon one another, each confusion making the other worse, so that the whole result is far more than would be given by the simple addition of the two. The so-called Act to amend the law of partnership, passed in 1865, is a very curious example of the manner in which the uncertainty of existing law may cause time and toil to be wasted in needless legislation. The Act was the residuum of a scheme for introducing the French system of companies *en commandite*; the Bill, originally due to a private member, was adopted by the Government of the day, and taken charge of by Mr. Milner Gibson, then at the Board of Trade. The law officers (Lord Selborne, then Sir Roundell Palmer, and Sir R. Collier), and other legal members, took part in the debate on the second reading. The debate was fairly well supported, and it was assumed on all hands that the Bill would effect a substantial change in the law. No backer suggested that the change was too slight to be dangerous, nor any opponent that it was so slight as to be superfluous. In the House of Lords the Bill was opposed by Lord St. Leonards, who expressed serious alarm for the trading credit of the country if it were passed. Lord Wensleydale thought it required material amendments. Lord Westbury defended the change as salutary and necessary. The Bill was passed and duly became law, and the law so made has become at

various times the subject of judicial consideration. The result of this consideration is the discovery that the Act really adds nothing, or next to nothing, to the law which had been laid down some years before by an important decision of the House of Lords. The Act was meant to do away with the hardship of the unqualified rule that whoever shared the profits of a business was liable as a partner. But that supposed rule (as now appears) was, in fact, abrogated by the decision in *Cox v. Hickman*, and the Act expressed only a part of the new footing on which the law was thus placed. Parliament intended to produce a substantial amendment of the law, and produced unawares a stray bit of codification. As an acute and plain-spoken judge has since said, the effect of *Cox v. Hickman* was not understood at the time. The singular part of the story is that the misunderstanding was shared by the law officers of the Crown, all the law lords (two of whom had been parties to the decision in *Cox v. Hickman*), and, it would seem, the legal profession generally. Whence the moral may be drawn that the evolution of law by the unaided natural process of litigation is an even more subtle and excellent thing than one would imagine, seeing that, as in this case, it may take not less than five years for a leading judgment of the ultimate Court of Appeal to be felt in its full effect. It is hardly possible to maintain that our undigested case-law is certain enough for all practical purposes when the wisdom of Parliament itself can be thus deceived on a matter of great practical and commercial importance.

## V. EFFECTS OF PARTIAL LEGISLATION.

Legislation under our present want of system is weighted with almost every possible disadvantage of form. Defects of form, however, may be endured, even if we hold that, as a matter of taste and dignity, the Legislature of a great country should endeavour at least to avoid gross faults of workmanship in the composition of the laws. If legislation were intelligible when we got it, we might perhaps be content. But it is too often not intelligible even when we get it at its best, unless to lawyers having a special knowledge of the subject dealt with; and this, not by reason of the difficulty or intricacy of the subject-matters in themselves, but by the singular entanglement of statute-law and case-law, which we shall now endeavour to explain somewhat further than we have yet done.

The statutory amendment of the law generally proceeds in this fashion. The common law, not necessarily the old common law of the books, but often some modern judicial development of it, is found inadequate or inconvenient. Parliament thereupon provides a remedy by adding to or varying the existing law in certain particulars. The amended law resulting from this process consists of the former case-law taken together with the statutory addition or variation. The amended Act is framed by persons who know, or profess to know, the exact state of the law as it was before the Act, and it assumes the like knowledge on the reader's part. Consequently it is

intelligible in proportion to the truth of that assumption, which amounts to saying that in most cases and for most persons it is not intelligible without a great deal of trouble. The Statute-book would be a real book if the fiction that every one knows the law were a fact. In that case every new statute would be in itself a real and complete piece of information addressed to all persons concerned. But since the fiction is not a fact, statutes composed on the plan above mentioned are a kind of hieroglyphics to the ordinary Englishman. Nor is their reading always an obvious matter even to experts. There is a whole science of interpretation better known to judges and parliamentary draftsmen than to most members of the Legislature itself. Some of its rules cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds. Our modern law of real property is simply founded on judicial evasion of Acts of Parliament, which, however, was of such a flagrant kind as could not take place now-a-days. This kind of jealousy is by no means wholly extinct; we do not even say that under existing conditions it may not still be sometimes useful.

To return to our immediate subject, the growth of statute law. The Legislature is fortunate if its efforts are so well considered and so skilfully executed that a single Act is found sufficient to effect its purpose once for all. More often the first amending Act becomes the subject of interpretation,—possibly of a narrow

interpretation which defeats most of the real intention. The law as amended and interpreted is discovered to need re-amendment; and upon the fresh amendment the work of judicial interpretation begins again. And so it goes on till we have a series of statutes which to an uninitiated observer might seem to deal with their whole subject, but are really mere islands scattered in an ocean of case-law.

The Factors Acts are a sufficiently good instance of this operation, though probably by no means the strongest case that could be found. The Acts in question extend over the space of about forty years, the latest of them having been passed in the year 1877. The first of them presupposes in the reader an accurate knowledge of the common law, and each of the following ones presupposes, in addition to this, knowledge of the effect produced on it by the foregoing statutory alterations and the judicial interpretation thereof. The general rule of the common law was that a person dealing with the ostensible owner of goods did so at his own risk. "To make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge, as the case might be." This was subject to an exception in the case of sale in "market overt," which was no doubt a large exception, and may have been in practice a sufficient one, so long as markets were the principal means of carrying on commerce, but which has become of very slight importance by the change of modern habits.

The Courts held, after some dispute, that the employment of a factor does not of itself authorize him to pawn or pledge goods entrusted to him ; nor did the possession of documents of title give him any further power in this respect, the principle of the common law being that such possession could have no greater value than the possession of the goods themselves. Such a state of things being intolerable under the conditions of modern commerce, Parliament went to work to mend it. The Factors Acts of George IV. enabled persons "entrusted with" documents of title to make valid sales or pledges of the goods to persons dealing with them in good faith. Power to sell, but not to pledge, in the usual course of business was also given to agents entrusted with goods. It remained unsafe to make advances on goods, or on the documents representing them, to a person known to have possession of them only as an agent. And it was held, and no doubt rightly, by several decisions both on these and on the later Act, that the agency must be of a kind which would in the ordinary course of things cover a sale or pledge, not an agency totally distinct from a factor's, such as that of a clerk, warehouseman, or carrier. Then came the Act of 1842, which made the power to pledge co-extensive with the power to sell, but did not increase the latter. Consequently an agent entrusted with goods for a purpose unconnected with selling or pledging them, or even an agent for sale who wrongfully retained the goods after his authority had been countermanded, could not make a valid disposition of the goods as against the true owner.

It is not to be supposed that these consequences were immediately or easily worked out; on the contrary, they were the fruit of much hard-fought litigation. In some of the cases there was considerable hardship on persons who had advanced their money to apparent owners without any means whatever of knowing their real position. But nothing more was done till the last straw was laid on by the decision in the case of *Johnson v. Crédit Lyonnais Company* early in 1877; a decision, however, which was inevitable whenever the point arose, and was affirmed, after mature consideration, by the Court of Appeal. That case revealed to the public that large and important kinds of ostensible ownership were left wholly untouched, and persons dealing with them unprotected, by the existing Factors Acts. A dealer who had sold a quantity of tobacco, but had been allowed to keep the dock-warrants, obtained an advance on the warrants from the defendant company, who knew nothing of the sale. The seller absconded, and left the buyer and the company to settle it between them. It was impossible to maintain that the seller was a factor or agent entrusted with the dock-warrants by his purchaser; yet the hardship was exactly the same as if he had been. Thereupon the amending Act of 1877 was passed, which supplied this *casus omissus* and one or two others.

We shall assume that the law is now left, so far as regards the substance of it, on a satisfactory footing; our purpose being only to call attention to the curious fashion in which it has been done. We have four



separate Acts of Parliament whose effect cannot be understood without an elaborate process of reading between the lines. Even to a lawyer they are obscure without a commentary, which is furnished by the elaborate judgments delivered in sundry recent cases. To a man of business they must be absolutely perplexing. The last Act recites that "doubts have arisen with respect to the true meaning of certain provisions of the Factors Acts, and it is expedient to remove such doubts, and otherwise to amend the said Acts, for the better security of persons buying or making advances on goods, or documents of title to goods, in the usual and ordinary course of mercantile business." The interpretation of this preamble might be as follows:—"Whereas it appears from divers decisions of the superior Courts, and especially from *Johnson v. Crédit Lyonnais Company*, that the provisions of the Factors Acts are insufficient for the security of persons buying, etc., and otherwise deficient in both matter and expression, and it is necessary to supply such defects." The facts are, indeed, fresh in the memory of the present generation of merchants and brokers, but twenty years hence the Act will be as great a puzzle to the lay people as its predecessors. The reader will now be prepared to understand how far our so-called Consolidation Acts may be from really consolidating the whole law on the several topics they deal with.

## VI. THE REMEDY.

Such is the state of our commercial jurisprudence, and such are its inconveniences ; and they are inconveniences which the increase of litigation and of reported cases tends, on the whole, to increase more than to diminish. As yet, however, we have done next to nothing to provide against them. An intelligent observer not familiar with the ways of our Parliament might infer from this apathy that competent advisers had unanimously, or all but unanimously, declared the case to be hopeless. His inference would be natural, but mistaken. The remedy lies straight before us, and has already been applied with success by the majority of civilized nations. It is the statement of the law by the supreme authority of the Legislature, and in an orderly and lucid form ; in one word, codification. If Parliament is afraid of undertaking this, it is afraid of undertaking that which the Italian Parliament, the German Reichstag, and the Swiss Federal Assembly have been doing without fear and without failure for several years past. The honour of the latest achievement of this kind belongs to Switzerland. The Federal Legislature, in exercise of the authority conferred on it by the Revised Constitution of 1874, has passed a Code of the law of obligations which will take effect from the beginning of 1883. This code contains a little over 900 sections, and covers (with certain exceptions made for special reasons), the whole ground of the French and German commercial codes, besides more than one topic not

included in them. The chief exceptions are maritime law, with which Switzerland is naturally not concerned, and the contract of insurance, which is reserved for supplementary legislation. The Code has peculiarities of both matter and form, as distinguished from other Continental works of the same kind, which make it specially interesting to Englishmen. In the first place, it does not, like the French "Code de Commerce," or the German "Handelsgesetzbuch," assume a standing distinction between persons in trade and other citizens; nor are the dealings and lawsuits of traders referred, as in France and Germany, to the cognizance of special courts. The view taken by the Swiss Legislature agrees with our own. The framers of the Code thought this division of citizens into classes repugnant to the spirit of Swiss political institutions, and on purely legal grounds useless and unscientific. Their example and their reasons should be considered by those persons in England, if such there be, who really think men of business would gain anything by having separate commercial courts or a separate commercial code. I am not aware that any competent person has openly advocated in this country the sundering of civil and commercial law; and one is fain to hope that those who have now and then called for it did not clearly understand what they wanted. The Swiss law-makers have rightly seen that the true commercial code is a code of civil business applicable to the dealings and duties of all citizens alike.

Another notable point is that the Swiss Code of

Obligations is bilingual. It is equally "Bundesgesetz über das Obligationenrecht" and "Code fédéral des obligations."<sup>1</sup> The German and the French were drafted side by side, and both are equally original and authentic. Any one who has tried his hand at producing a correct and idiomatic version of technical propositions in a foreign language can appreciate the nicety of the Swiss codifiers' task. Probably a bilingual text, as distinct from an original text with an authorized translation, has never before been produced on such a scale. Here, then, is a grave difficulty of form which the Swiss have overcome in addition to the other difficulties of codification, while we stand helpless before those other difficulties alone. If I may borrow a comparison from Mr. Justice Stephen, it is as if a man who every day carries on a trying and arduous profession should be afraid of ordering his own dinner.

The Swiss committee of draftsmen was favoured on the other hand, by some conditions. It included the late Professor Bluntschli, who probably stood at the head of European experts as touching that particular undertaking. There is no reason, however, why an English codifying Commission should not include persons of the like eminence in English law, which indeed has been the case as to the draft criminal code. Again, the Swiss codifiers had the German

<sup>1</sup> The law of Obligations, in the Roman and Continental meaning of the term, includes all or nearly all of what an English lawyer would assign to the heads of Contract and of Tort, excepting those torts, such as trespass, which violate rights of property in the strict sense.

commercial code before them as a pattern to be followed or improved upon. In England we may derive exactly the same advantage from the recent legislation of British India. The Indian Contract Act, which has been law for nearly ten years, embodies English law with only slight alterations, and would furnish us with a considerable ground-work ready made. I do not say that we could adopt the Contract Act, or even most of it, as it stands. Careful criticism and revision would be needful, and a good deal of development in some places. But it must be remembered that the object of legislation is not to produce laws of such perfection as to be above theoretical or verbal criticism, which is impossible, but good working laws which shall be substantially just and fairly intelligible. This is possible, and no better reasons than ignorance, timidity, and the extreme cumbrousness of our legislative procedure, stand in the way of our doing it at least as well as our neighbours have done. If any one wishes to form a notion of the contrast between what is and what might be, let him, as I have already hinted in this essay, compare the chapter on the sale of goods in the Indian Contract Act with the condition of the same subject in any good English textbook.

One thing is certain, in any case, and forms the moral I chiefly wish to point by the foregoing remarks. Nothing will be done for the better ordering of our laws until men of business perceive the importance of it, and are strongly minded to get it done; nor, what is more, until they make it in one fashion or another

unmistakably plain to Parliament that they are so minded, and mean to see the thing set about in earnest. Only the workmanship and details of the machinery depend on lawyers. The moving force must come from the men of business themselves. With vigour and good-will it is conceivable that we may not only improve on Anglo-Indian legislation in form, but even overtake its work ; for in India things stand still for the present. It would not become an outsider to discuss the reasons of this ; but I believe they are mostly, if not entirely, connected with the peculiar circumstances of Indian society, and of a political more than of a strictly legal nature.

## IV.

THE LAW OF PARTNERSHIP IN ENGLAND.<sup>1</sup>

IT will be a reasonable assumption, I think, that those persons who have done me the honour of coming to listen to this paper are more likely to be interested in the practical bearings of the law of partnership in its present condition than in anything I could say about its history or technical development. I shall, therefore, not indulge a taste for historical inquiry on this occasion; which will not be a very difficult piece of self-denial to practise, as the whole early history of commercial law in this country is exceedingly obscure. Our present law of partnership is fortunately quite modern, by far the greater part of it having been worked out by the courts within the present century. I say fortunately, because its late origin has secured it an almost entire exemption from the disfigurements and deformities that cling to many other branches of our jurisprudence. The law of partnership was born too late to fall into the hands of judges who were the slaves of a scholastic habit of mind, and could not be

<sup>1</sup> A Paper read before the Bankers' Institute, Wednesday, 20th October 1880.

induced by any reasons of expediency to reconsider their narrow principles, or abate the rigour of their still narrower deductions from them. The convenience of mankind and the actual usages of men of business have, on the whole, prevailed in the formation of our modern commercial law, so that the great bulk of it only wants putting into shape to be accepted as satisfactory. This is eminently the case with the law of partnership. I do not mean that it is perfect; for I think it has one great want, to the consideration of which we shall presently come. But I do mean that it is reasonable as far as it goes; that it is singularly free from oddities and anomalies, and contains very few propositions, if any, which strike a man of business as absurd. There is one part of it, indeed, which is still in a somewhat entangled state, namely that which deals with the administration of the assets of an insolvent firm and the separate property of the partners. But this subject is interwoven with the law of bankruptcy, and cannot be practically considered apart from it. We will therefore merely note in passing that the liquidation of insolvent firms—or (since the law strictly knows nothing of the firm) I should rather say the estates of insolvent partners—is governed by a kind of rule of thumb which has been condemned by several high authorities, and for which nobody has yet given an intelligible reason. I cannot find, however, that other nations have been much more successful in dealing with this problem. The Scottish law of partnership is more enlightened than ours on several points, but hardly shows itself



superior on this ; nor is there anything like a generally accepted plan on the Continent. In France the law and practice appear to be so little settled that a comparison with our system is impracticable. In Germany they are still, I believe, more or less various in the different States. Except on this one perplexed topic, to which I shall not return, the English law of partnership is in substance a creditable production. Being, as I have said, free from absurdities, it has likewise escaped all but scot-free from statutory tinkering,—an operation which has brought some other parts of our law into a confusion bewildering even to lawyers. As to the form of partnership law, it is just the same as that of the great bulk of the law of England ; that is to say, it has no definite form at all. You have to pick out general rules as best you can from the mass of reported decisions, and the remarks of the judges who delivered them, and fill up the gaps and doubtful places that remain by more or less probable conjecture.

Such is the general nature of the materials we have to deal with. We may now come to the questions which are of practical interest for us at this moment. They may be summed up in two words—consolidation and amendment. Perhaps I may take it as an undisputed fact that a considerable majority of business men would like to have the law of partnership expressed in a compact and easily accessible form, from which any fairly intelligent person could learn in outline what the rights and liabilities of partners are. In other words, as I am not addressing

an audience of lawyers, I may perhaps be dispensed from going over the general arguments in favour of codification, or meeting the objections to it—some of them very subtle and curious—which have been made by ingenious persons. I will only say that, notwithstanding all the objections, the people who have already codified their laws even in a rough sort of way seem to have no manner of doubt, after the experience of a good many years, that it was a useful and profitable thing to do. No country which has enacted complete or partial codes would now think of returning to the old state of things. But in England we shall never get a code, or any chapter of a code, by force of pure argument. We must make it clear that a strong body of persons are interested in the thing being done, want it done, and see their way to doing it. In the case of the law of partnership these conditions are better fulfilled than in any other I know of. The commercial world, which I need not say is a power to be reckoned with in public affairs, seems to have pretty well made up its mind that an authentic consolidation of the law of partnership is desirable. And the law being, as I have said, modern and rational in substance, affords an unusually favourable field for enterprise of this kind. The points on which there is now any serious doubt are few; those on which distinct alteration is required are hardly any. Thus the problem of recasting in a legislative form the effect of the present authorities is almost entirely one of expression. Having tried it myself, I do not pretend that it is an easy one; but I am sure

it is not insoluble. I will so far depart from what I said just now as to notice one objection before passing on. Some people ask why digests and abridgments of the law by private writers should not, for all practical purposes, do as well as a code. The answer is that there is an impassable gulf between the two things. When any part of the law is consolidated and declared by Parliament, the words of that Act of Parliament are the law of the land, and if doubts arise upon them it is because the words are ambiguous or fail to meet the particular case. But in the case of a text-book, or digest, or abridgment, however carefully it may be compiled, and whoever the author may be, even if he were at the head of the legal profession, his words are not the law of the land; they are only the statement of his opinion as to what is the result of the authorities, and his opinion may or may not be followed when a case in point comes before the court. Even if, as in France and on the Continent generally, text-books of a certain standing had an authority co-ordinate with that of actual decisions, the text-writer's authority would still be only one among many. We want, then, to consolidate the law of partnership by a legislative act; and we can do it with very little substantial departure from the authorities in which the law is now contained.

But we have said that there is a great want in the English law of partnership. It needs to be amended, not by changes of a detail here and a detail there in the rules which have been laid down by the courts,

but by supplying this whole missing chapter. The institution of partnership *en commandite*, or limited partnership, as we may call it in English, is unknown in the United Kingdom, and in these kingdoms alone, or almost alone, among all the civilized countries of the world.<sup>1</sup> Probably every one here knows, in a general way, what partnership *en commandite* is; but it may as well be stated for the sake of clearness. The essence of *commandite* partnership is the conjunction of at least one managing partner who is liable without limit for the partnership debts, like a partner in an ordinary firm, with one or more contributing partners who do not take an active part in the business, and are liable only to the extent of what they contribute, or have undertaken to contribute, to its capital. This form of partnership has been known on the Continent for many centuries. The Mediterranean trade of the middle ages was carried on principally by its means. In France Lewis XIV. regulated it by an ordinance of 1673, which has been substantially adopted in the modern commercial code. How it failed to establish itself in England or Scotland I am unable to say: it is not impossible that it was recognized by the special tribunals which administered the law-merchant down to the seventeenth century, but of the proceedings of those courts we know hardly

<sup>1</sup> The Companies Act of 1867 makes an approach to the French *Société en commandite par actions*, or German *Kommandit-Gesellschaft auf Aktien*, by authorizing the formation of companies in which the liability of the directors, or managers, or managing director, is unlimited. Neither in reading nor in practice, however, have I met with any instance of such a company being formed.

anything. We must also remember that for a long time the foreign trade of England was almost entirely in the hands of Italian or Hanseatic merchants, who did not resort to the English courts of justice when they could help it, but settled their disputes by some domestic procedure of their own. So it was, at all events, that when the law of partnership was formed by modern judges and chancellors, the notion of a partner with limited liability never appeared. Indeed, the tendency of the courts was for a long time to hold that whoever in any way shared the profits of a business must be a partner in it, and liable for all its debts; and if this tendency had not happily been arrested by the decision of the House of Lords in a leading case, a very serious conflict between the legal and the mercantile sense of justice might have been the result. The North American States which were colonized from England took over English law as the foundation of their jurisprudence in partnership as well as in other matters. Louisiana and Florida, however, not being English colonies in the first instance, have always had the system of partnerships *en commandite*; and in the course of this century most (I think we may say all) of the other States of the Union have naturalized it under the name of special or limited partnership. Thus we are left practically alone in excluding it; and I think there is a fairly strong presumption that we lose something by not possessing an institution which has been found useful by so many mercantile communities. The economical reasons in favour of limited partnership

are strong, but I do not think it necessary to enter upon them at present.<sup>1</sup> Not only should I be, if I am not mistaken, preaching to those who need no conversion, but I should go near to commit the graver fault of enlarging on matters which many of my audience understand better than myself. The only part of the question on which I can add much to your knowledge is the technical one. It may not be superfluous to give my testimony, founded on the actual experiment of drafting a Bill, that the technical difficulties of making the *commandite* system fit in with our existing law of partnership are not of a really formidable kind.

Probably some of you know that many attempts to introduce the system have been made in this country, and thus far none have been successful; and you may reasonably ask why this has been so. So far as I have made myself acquainted with those former attempts, I am disposed to ascribe their failure to two causes,—that the principle of the desired innovation was not always thoroughly understood by its promoters in Parliament, and that, whether in consequence of this or for other reasons, their efforts were timid and half-hearted. It is a vital point in the system that the *commanditaire* or limited partner is not a creditor of the firm, but a real partner whose liability and powers are limited. He puts a certain sum into the concern, and is answerable only to the extent of that sum; on the other hand, he has not

<sup>1</sup> They may be seen briefly stated in Mill's *Political Economy*, Book v. chap. ix. sec. 7.

the same rights of taking part in the business as an ordinary partner, but is subject to certain restrictions, of which the details are fixed by the law of the particular country. He is no more a creditor of the firm than a shareholder in a company is a creditor of the company; he no more lends his money to the acting partner than holders of railway shares lend their money to the directors. If you regard him as a lender of money to the firm, who takes a share of profits instead of interest, you altogether confuse the true relation. Unhappily, just this confusion seems to have prevailed in the attempts made in England to procure legislation on the subject. The result has been the so-called Act to Amend the Law of Partnership of 1865, which was afterwards found to have added little or nothing to what had been settled without the aid of Parliament by the more recent decisions. The most important section of this Act enables persons to lend money to traders, and receive a rate of interest varying with profits, or a share of profits in lieu of interest, without becoming responsible as partners. What happens in practice is that the lender who advances his money for a share of profits is not content to be a passive creditor. Fondly supposing that the Act enables him to assume the position of a partner in everything but liability, he enters into an agreement by which his so-called loan is completely embarked in the capital of the business, and he receives in return most of the usual rights and powers of a partner as between himself and the nominal borrower. Then, if the business fails, he

finds to his confusion that his excess of caution has put him in exactly the position he wanted to avoid. The Act declares that you may lend money and take a share of profits without being a partner; but it does not enable you to enter into what is substantially a partnership, and limit your liability by calling it a loan; and in this way it lures people into the very danger it was intended to protect them from. The case I have stated has nothing imaginary about it; it is the typical form of several which may be seen in the law reports, and others which have occurred in private practice. One practical conclusion which seems to be justified is that there is a strong demand in the country for some form of true limited partnership, for otherwise people would not run so much risk in order to get something as nearly like it as they can devise under the present law. Perhaps it is not without significance that in one reported case the parties actually referred to this Act of 1865 by the erroneous name of the Limited Partnership Act. Moreover, loans under the Act of 1865 are not registered; and this is complained of as leading to something like fraud on the public, as on the strength of a loan of this kind a trader may with little chance of discovery pass off borrowed capital for his own, and obtain credit on it. The Act provides, it is true, that the lender who receives a share of profits must be postponed to other creditors in case of insolvency (which, however, may be thought a poor consolation for them if there is not enough even so to pay a substantial dividend to any one); and I confess that I



do not see how trading with borrowed capital is to be prevented, so long as lenders are willing to risk their money in consideration of high interest. Still, if we had a recognized system of limited partnerships, there can be little doubt that most people would prefer the position of a limited partner to that of a lender, and that loans under the Act of 1865 would go out of use. At the same time I should myself think it well to put a stop to them formally, by enacting that every loan or agreement to lend money for a share of profits should have the effect of an agreement for a limited partnership; in other words, I would leave no middle term possible between a bare money loan for fixed interest and a true partnership *en commandite*. Limited partnerships would have to be registered in some way; this, I think, is allowed on all hands. And if the Act of 1865 were left as it is, while limited partnerships were introduced, it is possible that the form of a loan might be resorted to in some cases to escape registration; and these cases would naturally be just those in which registration is most desirable for the protection of the public. On the point of registration, I may observe that in France publicity is given to the number of *commanditaire* partners, and the amount of their contributions, but not to their names. The public register only shows that, in addition to the managing and fully responsible partners, whose names are given, there are so many unnamed contributors (*bailleurs de fonds*) answerable for so much apiece. In Germany, however, and in the United States, the names are put on the register;

and this last course is the more likely to be taken in England in the event of the *commandite* system being adopted. At least, it has been part of all the plans yet brought forward, and I am not aware that any one has expressed a preference for the French rule.

This brings me to the wider question of registration of firms in general. In the commercial world there appears to be, on the whole, a strong feeling in favour of introducing this in some shape. A Select Committee of the House of Commons considered the subject in 1872, and, after taking the evidence of a considerable number of bankers, merchants, manufacturers, and other persons familiar with commercial affairs, reported by a large majority in favour of registration; but the report had as much effect as the reports of Select Committees usually have, partly for a special reason which I shall presently mention. Among the witnesses who gave evidence in this sense were Mr. Samuel Morley, the late Mr. Kirkman Hodgson, and Mr. Higley, the general manager of the London and Westminster Bank. On the other hand, it has been suggested that it is easy for people in a large way of business to approve of compulsory registration, as it would cost them no trouble in comparison with what it saved them; but that such a measure would be vexatious and oppressive to small tradesmen and persons forming temporary partnerships for what may be called adventures as distinct from permanent business. But the proposal has for many years been under discussion, and I am not aware that any of the

persons who, as it is supposed, would be injuriously affected by registration have in fact made these objections for themselves.

But there is one practical difficulty of the gravest kind: the project of general registration has always met with steadfast opposition from the Board of Trade, and has little or no chance of being carried while this opposition continues. Mr. T. H. Farrer, who for this purpose is something more than the official representative of the Board, gave evidence before the Select Committee above mentioned, and explained his reasons for disliking the plan. The objections may be summed up, I think, under two heads. First, compulsory registration of firms in general would confer no positive benefit on registered partners sufficient to induce them to register in their own interest; and consequently such a law could be made effectual only by penalties which would be vexatious and liable to great abuse. Secondly, no official registration would fully satisfy the commercial world. A man of business wants to know not only what persons he is really dealing with, but what their credit is. Now it is evidently impossible for a public department to undertake a register of credit; it could only keep a register of names, which would give but one half, and the less important half, of the information sought. Persons and firms who have large dealings would still be obliged to keep a sort of private register of credit, as they do now; and thus the advantage of the public register would not be commensurate with the burden and expense. As to the

force of these objections I do not feel bound to express any decided opinion of my own, the question being not so much a legal as an economical one. On the one hand, the conveniences of registration are obvious, and it is difficult to see why partners, acting or not acting, in any honest business should in our time find any grievance in the fact being accessible to the public. Nor does the danger of evasion and fraud appear to me very serious; there would be little temptation to such courses if registration were made, as it easily might be, a simple and inexpensive process, and sanctioned by certain and moderate penalties which could be enforced without creating a sense of injustice. It has been suggested that men of straw and imaginary names might be put on the register; but this would hardly be the way to attract confidence, and besides, the making of false and fraudulent returns would be a criminal offence. But, on the other hand, one has a certain jealousy of anything that would bring the legal position of commerce in this country nearer to what it is in most Continental States, where men of business are dealt with as if they were dangerous animals, or at best a sort of creatures peculiarly incapable of taking care of themselves; where, instead of being governed by the same laws as other citizens, they have a commercial code to themselves, and paternal lawgivers prescribe to them how they are to keep their books. In the United States private enterprise has struck out a system intended to secure the advantages of a public register without its drawbacks, and this is said to

answer fairly well. There are three or four mercantile agencies which issue to their subscribers a book recording not only the names of traders, manufacturers, and bankers, but an estimate of their capital and credit.<sup>1</sup> It seems that there is no difficulty in obtaining full information through these agencies, and that it is almost always trustworthy. Perhaps it would be desirable to try something of the kind in this country; so far as I am aware, it has been done only very partially, and the great houses rely on private inquiries of their own. This, at all events, is an experiment which needs no aid from Parliament, while a general compulsory registration must be regarded for the present as unattainable. Indeed it seems to me that the body of opinion which now exists in favour of registration would not be inadequate, if methodically directed towards that end, to put a pressure on firms to disclose the names of their partners which would practically be as efficient as legislative compulsion. Some firms already print the names of the partners on their letters and invoices. If leading houses not only adopted this practice themselves, but dealt by preference with customers who adopted it, the omission of it would come to be thought disreputable, or at all events a matter for inquiry. Thus we should have a

<sup>1</sup> Evidence of Hon. T. W. Park before Select Committee of 1872. But I am told that the working of similar agencies in Canada is not well thought of by English houses who have opportunities of being acquainted with it. And it was mentioned in the discussion which followed the reading of the present paper that the information of the private agencies which exist in England is by no means free from errors, not of opinion, but of simple matters of fact.

self-acting system resting directly on public opinion and needing no new machinery of any kind. If public opinion is not strong enough to do this, I do not think it can be strong enough either to procure official registration or to save it from being ineffectual if established.

I will just remind you that these remarks do not apply to limited partnerships. Even the strongest opponents of registration in other cases allow that, if there are to be limited partnerships, they must be registered. In this case the difficulty about firms being willing to register does not arise, as registration is the price for which they receive the benefit of limited liability. If a limited firm failed to register, the partners would all be liable as general partners, and this would be quite enough to ensure obedience to the law without any further penalty.

Thus much of the nature of the improvements we may desire to see made in the law of partnership. Now let us see how the prospect of putting any of them in execution stands at this moment. This is a matter of which I cannot give you an account without a certain risk of talking too much about my own work. But perhaps the risk is sufficiently warranted by the interest of the subject. Last year, then, I was instructed by Mr. Sampson Lloyd, who sat for Plymouth in the House of Commons, and was acting in concert with the Associated Chambers of Commerce, to draw a Bill for the consolidation and amendment of the law of partnership. The objects aimed at were three. 1. To codify the existing law, with the excep-

tion of that part which is involved in the law of bankruptcy. 2. To introduce the *commandite* system. 3. To introduce a general system of registration of firms. The Bill was brought in during the session of 1879, but so late that practically nothing could be done beyond getting it printed, and ascertaining that competent persons both in and out of Parliament were in the main favourably disposed. I may mention that the Bill was backed by the present Solicitor-General. This year (1880) it was again brought in under the charge of Mr. Whitwell, the member for Kendal. We all know that the year has been an unhappy one, not only for private members' adventures, but for considered legislation generally, and the progress this Bill made was, under the circumstances, at least as good as its friends had a right to expect. It attracted the notice of the Board of Trade, and a certain amount of semi-official correspondence and conference took place, in consequence of which it was decided to drop the scheme of general registration of firms, and make some other smaller changes of detail. In effect, the Bill was resettled in consultation to meet the views of the Board, and, having been read a second time without opposition, was formally committed in order to be reprinted in its new shape. It had been drafted not without a view to some of the innovations having to be abandoned, and the registration clauses had been so arranged as to be easily cut adrift if necessary. Thus the Bill did not suffer as a work of art by this operation; indeed, I think it was rather improved. If time had sufficed, there was good hope that it would

pass the House of Commons; it was recommitted, and stood several times on the order of the day; but there were sundry little delays and hindrances, besides the press of more urgent business, and I believe it never got fairly into committee. But of serious opposition there was nothing or next to nothing; the one fatal enemy was time. The measure of success attained is partly due, I think, to the Bill being more ambitious than its predecessors. This statement is a paradox only in seeming, as I will proceed to show. The Bill not only innovates but consolidates; and to oppose a measure of consolidation outright is, at this time of day, a somewhat invidious thing. Besides, this way of framing the Bill makes the draftsman's task much more certain and satisfactory. If you try to piece on an innovation like *commandite* to the existing uncodified law, you have, as it were, no definite place to start from; and what is more, your Bill will at best be intelligible only to those who are familiar with the old law. But if you make the Bill in the nature of a code, you expound your old law before propounding your new matter, and so the Bill is complete and intelligible in itself. In this Bill the ordinary law of partnership is first laid down with as little alteration as possible,—and there is very little indeed, only the definition of a few points which are not quite settled at present,—and then limited partnership is provided for by defining what a limited partner is, and in what respects his position differs from that of an ordinary partner. In fact, that part of the Bill was constructed by going through the rules that apply



to ordinary partnerships, and expressly negating those which are not applicable to a limited partner, the others being left to remain in force; thus carrying out the principle I have already brought to your notice, that a limited partner is nothing else than a true partner in the firm whose liability and powers are limited. The foreign codes were of course consulted, but for various reasons were not found of so much use as might be expected: the German is, in my opinion, the best of any. As to registration, I need only say that both in the original and the amended form of the Bill we aimed at the utmost simplicity consistent with efficiency, and we wholly eschewed the cumulative penalties and disabilities which had appeared in some former projects. Altogether the result is far from discouraging, though it would be rash to prophesy final success within any certain time. It is worth remark that this Partnership Bill is a serious attempt at codification by private enterprise, and, so far as I know, the first of its kind anywhere; at all events, there is no other country where private enterprise is likely to be foremost in such an attempt. If it is ultimately carried, I think the mercantile community will be entitled to feel a certain pride in it. The chances must be measured by judges more disinterested than myself. But perhaps it may be allowable to say that we seem to be not much farther off from a Partnership Act than we are from the much-promised Criminal Code.

## V.

## EMPLOYERS' LIABILITY.

## 1.

THE question of employers' liability for injuries to their servants received in the course of their service, and through the default of another person under the same employer, has been settled for the present by the Act of 1880. But the settlement is only a provisional one. The Act is temporary, and has now no more than six years to run. As the time of its expiry approaches, discussion of its principles will doubtless be renewed. Criticism of the principles of the subject, and of the law of England as it stood before the passing of the Act, has therefore not lost its usefulness.

The grievance complained of on the part of the workmen was that, whereas an employer was liable to strangers for injury caused to them by the acts or defaults of his servants in the course of their employment, he was not liable to one servant for injury caused by the act or default of another. And the history of this exception is certainly not a favourable one. It appears to be rejected by Continental jurisprudence, and recent legislation in Germany has deliberately increased employers' liabilities in the case

of railways and other specified industries. In England and the United States it is modern, and in Scotland it was not so much adopted from England as thrust upon the Scottish Courts by decisions of the House of Lords. Notwithstanding its recent origin, two quite different though not inconsistent reasons have already been given for it. In the decision commonly cited as establishing the exception for England it is not easy to see what the reason was, or whether the judges in any way contemplated its extension to great industries employing a numerous staff of managers and servants in many departments and with many degrees of power and responsibility. On the other hand it may be said that the rule itself is an exceptional and harsh one, and cannot be shown to date from an earlier time than the Restoration ; and in having no warrant of positive legislation it is in no better case than the exception. This topic, indeed, will seem of little importance to those who know how much of our law has been settled by judicial discussion and decision within even the last generation or two, and how long many questions of practical interest have remained open. Almost the whole of our commercial law is modern judge-made law, and a great deal of it later than the immunity of employers now in question. The argument from novelty is altogether a dangerous one. If a duty has been but recently affirmed by decided cases, it is easy to say that it was never before disputed ; it is still easier, when an alleged liability is for the first time formally denied, to reply to the charge of innovation that such claims were previously unheard of.

History apart, the broad rule of justice would seem at first sight to be that a man shall answer only for his own faults and omissions, or at most for that which he could have prevented, not for faults and omissions of others which he neither encouraged nor approved. It is said, then, that if on special grounds of public utility a more extensive liability is imposed in some cases, this is an encroachment on common right, and should be rather checked than extended. In this view the distinction between strangers and persons in a man's own employment is the mark not of an exceptional immunity or privilege, but of the point where an exceptional burden ceases to be imposed. This line of objection to any extension of the master's liability is fortified by the high authority of Lord Bramwell, and it is certainly provoked by much of the so-called explanation to be found in the books. It may be said, further, that the rule of vicarious liability is not easy to justify on any rational grounds; that its actual origin is obscure, but probably belongs to a state of society and habits of mind quite different from our own; and that in the maritime law, where its hardship is unusually conspicuous, it has been found needful to mitigate it by express legislation. But this counter-argument, again, is in danger of proving too much. For the rule is maintained throughout the civilized world, and it appears on the whole to be allowed as just, notwithstanding its accompanying hardships, by the common sense of reasonable men. We hear of a protest only now and then, as when unusually heavy damages are given against a railway

company, or, as in the special matter in hand, by way of reprisal against attempts to extend the liability still farther. That which most men feel to be just must at least have some element of justice in it.

Let us consider, therefore, the grounds on which a master's liability for the acts, neglects, and defaults of his servants in the course of their employment may be explained. It will be understood that the terms master and servant are here used in the widest sense. In the first place, it is commonly said that the master is liable because the servant is his agent: "Qui facit per alium facit per se." But this is a plain begging of the question; it states the effect of the rule, not any reason for it. We can all understand that a man should be liable for what he really does by another's hand,—for actions which he has authorized or tacitly allowed. But here the question is why he should be liable for actions he has in no way authorized, just as if he had authorized them,—why he should be deemed to have done by his servant's hand things which he has not commanded, permitted, or desired. Oftentimes the act or neglect for which the master is held to answer is wholly against his interest. It may be such as to involve him in heavy loss, apart from the claims of any person injured. It may be, and often is, something which he has expressly forbidden and done all he could to prevent. Thus, in the very commonest case, a tradesman sends out his horse and cart, enjoining the driver to go at a moderate pace. The man drives furiously and runs over a foot-passenger. His master is liable. Again, a manufacturer has a steam-

engine at his works. The engineer is instructed not to let the water in the boiler run too low. He does let it run too low, and an explosion follows. Here too the employer is liable for any damage that results to neighbours and passers-by. If we say to him, "You did this by the hand of your servant, therefore you must pay for it," he will answer, "I neither did it nor meant it to be done; on the contrary, I charged the man to do nothing of the kind." This first explanation, then, is no explanation at all. It is merely an artificial statement of the thing to be explained.

There is another way of looking at the matter which may be suspected to count for a good deal in the popular view. A wrong without a remedy is, in theory at least, odious to the law; but in many cases the law cannot prevent the remedy from being only nominal. It may compel wrongdoers to pay if they can, but it cannot make them solvent; and it must now and then happen that an injured person has no better comfort at its hands than a right of action against a man of straw. To the popular mind a remedy not substantial is no remedy at all, and a result of this kind is not only unsatisfying (as it must be to every honest man), but unintelligible. Hence there is a natural endeavour to fix responsibility on some one who can pay. In the case of injury suffered through a servant's negligence, the servant, generally speaking, cannot pay, and the master can; and the feeling that compensation ought to be had somewhere jumps at the master's liability. "Respondeat superior" (another question-begging maxim)

is accepted without ado as a precept of natural justice. It is assumed that the relation of master and servant implies, by some evident and immutable necessity, that the master is to be liable for the servant's acts and defaults. The servants and the work being his, the liability must be his also. Such a view is too crude and formless to be a starting-point of fruitful discussion; yet we must beware of concluding off-hand that under its crudity real and obscurely felt reasons are not struggling for expression. Meanwhile we must seek farther. Possibly analogy may help us to circumvent the difficulties which appear to beset direct argument.

We are considering a rule which imposes liability on men beyond their own acts or defaults. But it is only one particular rule. Equal or greater liabilities are imposed by law in various other circumstances where it is even more obvious that the events from which the liability arises were not under the actual direction or control of the person liable. Most of these cases either fall in their legal classification under the general head of Negligence or belong to a nearly allied class. Thus "the owner of land is bound to keep it fenced; and if his cattle get into his neighbour's premises, he is liable for the damage done by them, whether the escape was owing to his negligence or not." Similarly an owner or occupier who brings on his land for his own purposes anything likely to do damage to his neighbours, such as an artificial reservoir of water, must keep it there at his peril. In these cases the obligation is all but absolute; a man is answerable, though the utmost

diligence be used to prevent mischief, for everything short of overwhelming and inevitable accident (in technical language, "act of God," or *vis major*). Again, occupiers of land or houses are bound, not absolutely, but to the extent of reasonable care, to keep their property from doing harm to persons who are there on lawful business with the occupier's consent, or passing by in the exercise of common right. Practically the distinction between this duty and the stricter duty in the case of dangerous things is a rather fine one; for the fact of an accident happening throws on the proprietor the burden of proving diligence. Thus a railway company was held liable some years ago for the fall of a brick from a bridge crossing a street, whereby a man was hurt; there being nothing but the fall itself to show that the bridge had been left out of repair or not sufficiently inspected. This decision has been followed in New York in the somewhat stronger case of a building falling bodily into the street; where lay common sense will without difficulty accept the remark of the Court that buildings properly constructed do not fall without adequate cause.

The common feature of all these cases is that a special duty is cast on a man, either in respect of his ownership simply or in respect of his voluntary use of his property in a particular way, which goes beyond his own acts or rather is independent of them. Personal diligence alone will not satisfy the legal standard of duty. The owner must at his peril see, as the case may be, that his fields are securely fenced, or his



reservoir water-tight, or that all proper precautions are taken to keep his wall in repair. If, to put an easy case, the handrail of a staircase leading to a merchant's office is rotten, and a customer falls over and breaks his leg, the merchant will not clear himself by showing that he employed an experienced carpenter to mend the rail, and the carpenter scamped the work. In fact, it matters not whether the actual default which is the proximate cause of the mischief proceeds from the owner himself, from his servants, or from a third person employed by the owner, but not his servant. Some applications of this rule come very close to the more special rule of liability for servants' negligence. In 1863 a man passing under a flour-dealer's shop in Liverpool was knocked down by a barrel of flour, which fell from an upper window of the shop. There was no actual proof that the barrel was being lowered by the flour-dealer's orders, or even by any servant of his, or that it was being carelessly done. But it was decided that he was liable; for "it is the duty of persons who keep barrels in a warehouse to take care that they do not roll out." This is responsibility for servants, and something more: it seems to include taking care that persons who are not one's servants shall not meddle with one's house or goods in a way to endanger passers-by. Thus we have in different circumstances different duties to keep one's property from being the occasion of harm to others, which may be arranged in degrees descending from the strictest. In one class of cases we have responsibility for all events and hazards which may

not be fairly considered as beyond human foresight ; in another, responsibility for due and reasonable care in the maintenance of a safe condition of things, not merely on the part of the person liable and his servants, but of every one employed by him or aiding him in the performance of his duty to the public ; in yet another, which includes the ordinary cases of employers' liability, responsibility only for the party's own acts and omissions and those of his servants. By taking this as a connected body of doctrine, we may perhaps get some light on the true nature and reasons of the rule of vicarious liability from which we started, and which seems at first sight equally difficult to attack and to defend on any satisfactory principle.

## II.

An employer's liability to strangers for the acts and defaults of his servants does not stand alone in being a duty extending beyond acts and events under the direct control of the person liable. Duties as wide or wider are imposed in other cases. Is there any common element present in all these cases in which a reasonable ground of liability may be discerned ? There seems to be this common point in all of them, that a man has for his own convenience brought about or maintained some state of things which in the ordinary course of nature may work mischief to his neighbours. Whether his property be cattle grazing in his field or water stored in a reservoir, or a structure crossing or overhanging a public road, there is a certain risk to adjoining owners or to the public which

necessarily accompanies the state of things so kept up. It is an intelligible principle that whoever thus exposes others to risk should abide the consequences if the risk ripens into actual harm. One could imagine it being applied to the full and unqualified extent of making the owner thus using his property liable at all events, without regard to any question of negligence. He might be made to insure the public against all risks of his undertaking. But such a rule is too harsh and sweeping for modern jurisprudence; and the general principle of liability is tempered, as we have seen, in various degrees. These degrees are fixed according to the nature of the risk involved. The owner of an undertaking dangerous in itself, who thereby creates an extra-hazardous risk for his neighbours,—such as the reservoir, which if it burst will inevitably flood their lands,—is held to the utmost diligence; he must answer for everything but *vis major*, however careful he may have been. So it may be said of cattle that if they break out it is their very nature to do damage where they stray, and hence the duty to keep them in is of the strictest kind. In England, however, there is some evidence that this duty was once less strictly defined than it now is. But in the case of things not dangerous in themselves, but only likely to become dangerous if reasonable care is not used, reasonable care is allowed to be the measure of the owner's obligation; and if he can show that all reasonable care has been used, he is discharged. Herein it is to be observed that the duty is not confined to personal diligence: indeed, it is of another

kind. What the law requires of the owner is not that himself in person, or any class of persons, shall take reasonable care for his property being in safe condition, but that reasonable care shall be taken. There are likewise duties of this kind which arise out of contracts of sale and hiring. It has been laid down, to take the latest case, that one who lets out carriages "is bound to supply a carriage as fit for the purpose for which it is hired as care and skill,"—not merely his own care and skill,—“can render it.” He must answer for all defects which might have been remedied by care and skill, whether he himself could have discovered them or not.

Now let us turn to the case of an employer of labour for any purpose. A man's undertaking or business is his property in a broad sense of the word. The vehicles, plant, machinery, or other effects with which he carries it on are his property in the strict sense. And by analogy to the cases we have already considered, the use of this property, so far as it entails any risk upon the public, must carry with it a proportionate duty. If the business be extra-hazardous as regards adjacent owners or the public, we should expect to find strict liability. And though such cases are not common, instances have occurred. Thus a railway company not especially authorized by Parliament to use locomotive steam-engines is liable for damage done in a field adjoining the line by the escape of sparks, notwithstanding that reasonable care has been used to prevent their escape; whereas legislative authority to use a dangerous thing is held

to put its use on the level of an ordinary business in which reasonable care suffices, and to that extent to confer immunity on the privileged person or body. But in the great majority of cases the risk is ordinary, or such as reasonable care will provide against. A tradesman's cart and horse, if carefully driven, will not run down a foot passenger of average prudence. Men at work on a building cannot well drop bricks on the passers-by without more or less carelessness, any more than the building itself will fall into the street unless it is ill-built. In these cases, then, which make up the general rule, reasonable care is sufficient for safety and is the measure of the employer's duty. But here we meet with a limitation which appears at first sight to be special. The master is liable for the acts and defaults of his servants in the course of their employment, not for those of a servant who goes out of the course of his employment, nor for those of a stranger who meddles with the business. Is there here an anomaly, as compared with the impersonal character of the duty in the other cases we have observed? The seeming anomaly will disappear on closer attention.

Analogy leads us to the rule that the employer's obligation is that reasonable care as regards the public shall be used in the conduct of his business. Now a man's business must be conducted by his servants if not by himself; indeed, it is their duty to prevent any one else from interfering. If a servant allows intermeddling, as if a coachman lets an incompetent acquaintance take the reins, this is a default on the

servant's part, for the further consequences of which the master may be liable. So that the limitation of an employer's liability to the negligence of himself and his servants is hardly a real limitation of a liability which might be wider, but belongs to the nature of the case. But the negligence must also be in the course of the servant's employment. This means, broadly speaking, that a man is liable for harm done by the use of his property without due care, but for his purposes and in a generally authorized manner, but not for harm done by the use of it in an unauthorized manner and for the wrongdoer's purposes alone. The reasonableness of this distinction will hardly be questioned as a matter of principle. In practice it must be admitted that the line is sometimes difficult to draw; the law has certainly not erred on the side of unduly exonerating employers.

We seem, then, to have arrived at something like a rational foundation of an employer's liability to the public for the acts of his servants. He is answerable, not for his servants as agents, or because they are his agents, but for the conduct of his undertaking with due caution. And it matters not whether the undertaking be for profit or not; for the fact of the thing being done by the master's orders shows that he finds it worth while to have it done. He is using his own means for his own purposes, whatever profit, pleasure, or convenience he may have in view. All this applies equally where the employer is a corporation (as in the familiar case of a railway company); and one of the strongest practical recommendations of the rule is

that without it a corporation could not be liable at all. For a corporation, being not a real but an artificial person, can be negligent only by its officers and servants, and a rule of duty confined to personal diligence would leave it scot-free.

It is satisfactory to find that the reasoning now put forward is quite in accordance with what was laid down many years ago by Chief Justice Shaw of Massachusetts, in a case which has ever since been the leading American authority on the subject. He said: "This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it."

This is a more lucid statement than I have been able to find in any English book. The same judgment goes on to deal with the case not yet considered, but out of which recent discussion of the whole matter has arisen, namely, the extent of an employer's liability to the servant himself for injuries received in the course of the service. On this point it must be confessed that Chief Justice Shaw's language and reasons are not so clear. One thing, however, is tolerably plain, that he grounds the exemption of the master as against a servant who takes hurt by a fellow-servant's negligence, not on what is called the doctrine of common employment, but on that of the later English authorities. This is that the servant must be presumed in entering on his employment to

take all ordinary risks of it, including the risk of accidents happening by negligent acts or omissions on the part of other persons engaged in the same undertaking. And this may be taken as the only ground on which the rule or exception, whichever it should be called, is now capable of defence.

### III.

The results so far obtained may be now summed up. The liability of an employer to the public for injuries caused by the acts and defaults of his servants is analogous to the duties imposed with various degrees of stringency on the owners of things which are or may be sources of danger to others. The man who conducts an undertaking of any kind, or has it conducted by persons subject to his directions, is held answerable for all operations incident to it being performed with reasonable care. On the other hand, a man who has work done for his benefit under a contract with some one who is not his agent or servant is not liable for the contractor's negligence. Take the familiar instance of running-down cases. If a private owner's carriage runs over a foot-passenger by the coachman's negligence, the owner is liable; if a cab or a hired fly does the same, the hirer is not liable. If a landowner or his agent employs labourers to build a wall, and a careless labourer lets a brick fall on a passer-by, the landowner is answerable. If he had employed a builder who found his own workmen and materials, the builder and not the owner would be the person to be sued. The difference between a



servant and an independent contractor, as explained by high authority, is in substance as follows:—A servant is one who undertakes not merely to do what he is told, but to do it as he is told; and if he obeys the employer's orders the employer cannot complain of the result, however ill it may turn out. The mark of an independent contract is that the person for whom the work is done lays down generally what shall be done, but leaves a discretion to the other party as to the manner of doing it; and the person who undertakes the work binds himself, not to obey orders, but to produce a certain result. It is not wholly obvious why this distinction should make a difference in the relation of the ultimate principal to the world at large. In many cases the employment of an agent or of a sub-contractor is a pure matter of detail, and the work of many sub-contractors who for the purposes of this rule are independent, all leads up to the completion of a single indivisible enterprise. And indeed the law has not been settled on this point without some fluctuation and difficulty. Recent authority, however, is sufficiently clear and uniform.

The truth seems to be that the division of labour has carried with it a division of external responsibility on grounds of social convenience. We could not carry on the business of life without constantly getting done for us by competent persons things which we are not competent either to do or to supervise ourselves. If the duty of answering for other people's negligence did not stop at the first independent authority,—“the first person in the ascending line,” as a

distinguished judge once put it, "who is the employer and has control over the work,"—the chain of liability would be endless, and we should be involved in a multiplicity of unknown risks. Besides, it is felt that it would be over-harsh to make men liable not only for acts which they cannot practically control in detail, but for the acts of persons over whom they have no control at all. In some cases there is not even any choice, or real opportunity of choice, as to the person contracted with. It may seem not obvious why the hirer of a carriage let out by the day or the week should not be liable for accidents, while the owner who drives in his own carriage is. But every one can see that it would be absurd to impose this liability on the hirer of a cab. Even where there is some choice, the vexation and hardship of including in the obligation every one for whom the work was done would outweigh any possible advantage. The rule as it stands is supposed to make employers more careful in their choice of servants, and in looking to the state of the plant and instruments of their business, and probably it does so to some extent. This is thought worth securing at the cost of some individual hardship. But the use of care in choosing a contractor who is likely to be careful is too remote a benefit to the community to be enforced by indiscriminate penalties. It has never been suggested, so far as we are aware, that the existing rule on this point falls short of what is required by natural justice or the safety of the public; so that this discussion is merely curious. Also it might be cut short by the

simple statement that business done for me by an independent contractor is not *my* business, and therefore I am not answerable for its conduct. But the inquiry is not idle; for there are plenty of cases in which it is by no means obvious to common apprehension that work done by contract as opposed to service is the contractor's work, and not the ultimate employer's. Moreover it is worth while, before coming to the point practically in dispute, to observe how the rule of vicarious liability is defined and fenced about, as a thing rather of positive institution than of natural consequence from elementary principles.

So far we have spoken of the duty imposed on an employer, or let us call him the owner of an undertaking, as concerns the outside world. What is or ought to be his duty to persons who are employed by him, and are themselves, as it were, part of the undertaking? English common law (that is, the law as it stood before the Act of 1880) says that he is not liable to them for anything but his own negligence; for example, if he fails to use reasonable care in providing safe and proper materials or machinery. This is objected to by spokesmen of the working-men's interest as an unfair exception; and it is not improbably regarded as a piece of class legislation by some who are unaware that the Legislature had nothing to do with it. But, when we look at the whole matter with such light as we have now obtained, it does not seem quite reasonable that the owner of the undertaking should be bound to persons who are inside it, so to speak, in the same way as to

those who are outside. A burden is imposed on him for the benefit and protection of the public at large, who have nothing to do with the undertaking, and are exposed without any choice on their side to more or less risk of injury arising from what is done in the conduct of it by the owner or his servants. The case is different with the servant or workman who is in the undertaking, and has entered into it of his own free will. It seems to me that the master's duty to the servant, by analogy to the duty of a householder to persons coming to his house on lawful occasions of common interest to both parties, might justly be fixed at this point: that the undertaking shall, to the extent of reasonable diligence, be in a safe and fit condition for the workman to enter upon. To the public the master answers, to the extent mentioned, for his undertaking and the whole conduct of it. To the servants employed in it he is answerable only for the conditions of the undertaking, not for its conduct, except in the event of his own personal negligence. Such is in fact, or very nearly so, the rule of English common law. The master must use due diligence in having proper appliances and competent servants: this much the servant may claim at his hands, not more. The reason for the master's duty to the public is not extended to make him pay damages to the servant for accidents befalling him, by no fault of the master, in a matter which the servant as well as the master has made his own. This is expressed in our later authorities by the statement that "when a man enters into the service of a master, he tacitly agrees

to take upon himself to bear all ordinary risks which are incident to his employment, and among others the possibility of injury happening to him from the negligent acts of his fellow-servants or fellow-workmen." In form this statement is open to the objection that it assumes a fictitious contract. The real question in this and many other cases is what conditions the law shall annex to the contract in the absence of special agreement on the point that comes in question. But the habit of setting forth relations and duties imposed by law under the disguise of fictitious agreements and promises runs through whole branches of English jurisprudence. It is an unfortunate one, but there is nothing peculiar in its employment here.

There is one point, however, in which the master's duty was by the common law too easily escaped. This is where the master delegates his general authority to a manager or superintendent. According to our authorities, the manager is the fellow-servant of the workmen engaged by him, and the master is not liable to any of them for injury caused by his negligence. Now the master is answerable to the servant for due care being used in the choice of his fellow-servants and provision of materials; and it seems strange that he should be able to cast off this duty by handing over the performance of it to a superior servant. As within the larger bounds of his duty to the public the master is not discharged by delegating the conduct of his business to servants, so within the narrower bounds of his duty to those employed in the business he should not be set free

by delegating his discretion and general powers of government to a manager.

Again, I have suggested, as the true theory of an employer's duty to servants, that he is bound to them in reasonable care for the conditions as distinguished from the execution of the undertaking; that is, not merely to be personally careful, but that due care shall be used. This might lead to an extension of his liability in some respects (apart from the question of delegated authority) beyond what English authorities have allowed. For instance, suppose there is a machine in a factory which it is A's duty to keep in repair and working order, and B's to attend to during its work, while C is occupied in producing or shaping something by its help; A, B, and C being all directly employed by the mill-owner. Now if C is injured by B's negligence during the work, the owner is not liable to C, and I do not think he ought to be. But if A neglects the repairs of the machine, and in consequence it goes wrong and injures C, I am much disposed to think that the owner ought to be liable; for the machine is, with regard to its general state of repairs and working order, one of the fixed conditions provided by the owner for the conduct of his undertaking. The workman should, as I incline to hold, have the same right to find the machine in good and safe order that a customer of the master's going to his counting-house has to find the approaches to it safe for him to walk in. But as the law stands it is otherwise; the proposed distinction has been rejected, though the cases are not many, nor of the highest

authority. On the other hand, I would by no means go the length of a proposal which I have somewhere seen, to the effect that the master should absolutely warrant to the servant the safety of his plant and machinery. For this strict kind of liability is elsewhere found, as we have noted, only in the case of extra-hazardous property or undertakings; and such a rule would actually put the servant in a better position than strangers, which cannot be seriously intended.

The suggestions above made are nearly, though not quite, identical with the changes in the common law made by the Act of 1880. The Act is framed in a peculiar manner, and must be tough reading to those whom it most concerns. But its provisions, when carefully read, are clear enough, and I believe there has been much less litigation upon them than was expected. If they err, it is in being too minute and making too many distinctions, which, however, could be scarcely avoided in a measure that was really a compromise. As regards the plant and permanent apparatus of the business, the workman is now entitled to compensation from the employer for injury caused by defects therein, provided that the defective condition was due to the fault of the employer, or of some one in his service whose business it was to attend to it. By this proviso the workman's position is one degree worse than that of an outsider who is lawfully on the spot, such as a customer of the employer who comes to the works on business. If a defect in the machinery is due not to the negligence of the owner

or any servant of his, but to that of the maker who sold the machine, or of some third person who supplied a special part of the machine to the seller, or in short of anybody concerned in the production of it, whether as a servant or as an independent contractor, the customer who is thereby hurt may still hold the owner liable. The workman, however, may not. Cases might easily happen where this distinction would be material, such as the breaking of a fly-wheel from a latent flaw. No sufficient ground can, in my opinion, be shown for it. The argument that the workman has put himself of his own free will in a position where he is exposed to such dangers applies equally to every one else who comes to the works. The workman who is there all the week and the customer who is there for ten minutes are alike there by the employer's consent, and for the common advantage of the employer and themselves. If it is to make any difference that the workman is bound to be there, one does not see why it should be against him.

Then the employer is made liable to the workman for injuries happening from the negligence of people holding positions of delegated authority or control in the business. No attempt is made to define what amounts to superintendence or delegation of authority, but sundry common cases are specifically dealt with. Under one sub-section or another of the Act the cases of most manifest hardship which arose under the common law rule seem to be effectually excluded. One of the worst was that of the carpenter employed by a railway company to do repairs in an engine-shed where



some of the company's porters were moving an engine. Instead of seeing that the engine cleared the carpenter's work, they let one end of it knock down a ladder supporting the scaffolding, and the man was seriously hurt. If the carpenter had been doing the work as a tradesman, the company would have been clearly liable to him. But he was paid by weekly wages, and thus was the company's servant, and, as was said, in a common employment with the porters. A very strong Court held unanimously that the company was not liable. At the present time the carpenter might recover under the clause of the Act of 1880 which gives a right to compensation where the injury takes place "by reason of the negligence of any person in the service of the employer who had the charge or control of any signal, points, locomotive engine, or train upon a railway," though it would probably be argued that an engine on a turn-table in a shed was not "upon a railway" within the true meaning of the enactment. This kind of specification is rather clumsy, and does not proceed on any satisfactory principle; but it would hardly be possible at present to obtain agreement on any comprehensive definition. The proper way of stating the law would be to declare explicitly what are the master's duties, first to the public, and next to his own workmen. But this means codification, and is for the present unattainable.

The right of the workman to compensation is in every case subject to the same conditions as would be the right of an outsider in the same circumstances. Practically this means that he must not have been so

careless himself that the accident may be considered his own fault. In technical language, he must not have been guilty of contributory negligence. The doctrine known by this name is instructive in relation to the more general features of the subject, and deserves some words of remark in this place.

#### IV.

This general qualification of liability for negligence, running as it does through the whole subject, does not especially affect the liability of employers as such. But as concerning the immunity of employers for injuries to their own servants in the course of their employment, the doctrine in question appears to have some bearing on the reason once assigned for that immunity, but now abandoned. On the other hand it is connected with rules of liability peculiar to maritime law, which in their turn seem anomalous and are difficult of comprehension until further consideration has shown that the difficulties and harshness of the common-law rules to which they are opposed are indeed less apparent on the surface, but are hardly of less magnitude. The rule of contributory negligence is obviously just in principle, but its justice is equalled only by the perplexities that arise in its application. In a general way it may be stated in this form, that one who has suffered hurt or loss which he would not have suffered but for another's want of due diligence must nevertheless not recover compensation if he has materially contributed to the injury by some carelessness or breach of duty on his own part. In

popular language, he cannot recover if he suffered by his own fault. As the old books now and then say, though not in cases of this class, "it was his own folly." That common sense demands some such rule is indisputable: when we come to deal with specific facts, it has to be settled what relations of a man's conduct to injuries received by him will make him so far a contributor to his own mishap as to put him in the wrong. How much of his own folly must a plaintiff contribute to the total conditions of the event to determine a court of justice to say that the fault was his rather than the defendant's? If judges had been left to work out this problem for themselves, it is not unlikely that it would have remained a matter of undefined judicial discretion. The determination of the facts in each case need not have been sharply marked off from the consideration of what is the precise question of fact that is legally relevant. But with our jury system the jury are judges of fact; and on the other hand it is the judge's duty to put the question of fact to them in the proper form, and the manner in which he frames it may be, and often is, contested by a dissatisfied party. Hence a particularly minute and searching scrutiny is brought to bear on "questions of mixed law and fact," as they are expressively if not quite accurately called. In the present case it can hardly be said that a final result is yet arrived at, nor has the rule ever been laid down in a complete shape. It appears on the whole that the loss must fall, whether by way of liability to pay damages or disability to recover them, on that side on which is

found the immediate cause of the injury. By "immediate cause," in itself an objectionable term, but not easily replaced, we mean that negligent act or omission which a reasonable man, looking at the matter in a common-sense way and without pretension to philosophical accuracy, would assign as being more than any other one incident of the whole event the reason of the mischief that happens. In many cases the test question may be more simply put in this form: Which party might last have prevented the injury by the exercise of ordinary care? Thus, a man leaves a pole across the public road opposite his house. A neighbour rides furiously down the street in the early twilight of a summer evening, runs against the pole and is hurt. He cannot recover damages, for although the defendant had no right to obstruct the road, the plaintiff might with ordinary care have seen and avoided the obstruction. On the other hand, a man's being on the wrong side of the road is no justification for driving against him; and on the same principle the owner of a donkey who left him unwatched on the highway was, in a well-known case, allowed to recover damages against the owner of a waggon which, going "at a smartish pace,"—in other words, as the Court considered, a pace inconsistent with ordinary caution,—ran over the donkey and killed it. There is no small interest in observing how all the subtleties of the theory of negligence, in all its various branches, work round at last to the statement of a question whether some one did or failed to do what a reasonably prudent and competent

man might be expected to do under the circumstances.

Now the theory of the earlier cases on injuries received by servants in the course of their employment, so far as any definite theory can be extracted from them, is that a prudent servant has at least as much power as his master of observing and controlling the conduct of his fellow-servants. In fact, it is his duty, in faithfully watching his master's interest, "to protect him against the misconduct or negligence of others who serve him." Hence it is inferred that when a servant suffers by the negligence of a fellow-servant it is so likely to be in some considerable degree by his own fault that it would be unjust to hold the master liable. The rule is stated, like other rules of liability which are anomalous as compared with the general principles of the law, to be "founded on the expediency of throwing the risk upon those who can best guard against it." We are not aware of any expressions in the books which would justify us in saying in so many words that a presumption of contributory negligence has been made against the servant in this class of cases; but the notion in which the doctrine took its rise was not very different. But in course of time the doctrine was extended to cases in which the possibility of mutual supervision or control, as between the servant whose negligence caused the accident and him who suffered from it, was absolutely excluded by the facts. To such states of fact the reason that it was the servants' business to look after one another could not by any ingenuity be applied.

However, there is a refinement of the doctrine of contributory negligence which is perhaps not wholly unconnected with the doctrine (as it used to be called) of "common employment." It has been held that a passenger in an omnibus or train is in some mysterious manner "identified" with the owner of the conveyance in which he is travelling. The effect or meaning of this identification is that if an accident happens by the negligence of a third party,—such as a collision with another omnibus, or with rolling stock of another railway company,—under circumstances of contributory negligence on the side of the first-mentioned conveyance, the passenger cannot recover against the other omnibus owner or railway company for any hurt he may sustain. He finds himself in constructive default by a process of reasoning which imputes to him, by an unhappy alliance of theological and legal supersubtilty, the negligence of the person in charge of the omnibus or train to which he has committed himself. I agree with the criticism that has been passed in more than one quarter on the decisions, fortunately not yet (in England at any rate) great in number or of the weightiest authority, in which this singular rule is propounded. Some remarks made last year by Lord Blackburn in the House of Lords afford ground for hoping that it may be ultimately discredited. Such plausibility as it has appears to depend on a false analogy to the community of occupation and interest by which a servant and his master are in a certain sense identified. It is this bond of a common undertaking between employer and employed,

their union into a single *familia*, to use the Roman term, distinct from the outside public, that furnishes the most solid reason for the distinction established in English and Anglo-American law between a master's responsibility to the public and his responsibility to his own servants; a distinction by no means destroyed in England, though modified by the Act of 1880. If we attended more to verbal consistency than to real convenience, we might say that, every servant being "identified" with his master, and the master identified with his servants, fellow-servants are identified with one another, and one of them cannot sue another for anything done or omitted in the course of their employment any more than he can sue himself. It is perhaps fortunate that this particular conceit has never occurred to the Courts: as it is, we may harmlessly suggest it as an illustration of the danger that constantly attends the use of metaphorical language. Even in strictly legal reasoning, and when the subject-matter and the terms are familiar, a vigilant check should always be kept upon language of this kind. In considering the wider analogies of legal rules, and still more in discussing the policy, in other words the convenience and justice of the law, the only safe way is to discard it altogether.

## VI.

## THE THEORY OF PERSECUTION.

## I.

THE popular view of persecution, at least in Protestant countries, is founded almost entirely on the examples afforded by the proceedings of the Roman Church during and since the Middle Ages; and it is not uncommonly thought a sufficient explanation to say that persecution was invented by the priests for the sake of maintaining the pre-eminence of their own order. Such an explanation, however agreeable it may be to ordinary minds to throw all the odium of disgraceful chapters of history on a particular class of men, is superficial at best. For the Church has been able, with slight exceptions, to make persecution effectual only by means of the secular power; and the secular power which lent itself to this purpose was a joint agent, and must be held jointly responsible. However eager the clergy might be to stimulate and direct the anger of the faithful against heretics, their efforts would have been vain if the bulk of the laity had not been predisposed to persecute heretics when duly pointed out. So far from persecution being merely the creature of priestcraft, it would be as near the truth to say that priestcraft was invented in order



to organize persecution. The truth is that mankind are prone to persecute heretics from several different motives, of which corporate ambition and the desire of crushing rival sects have often taken advantage, but which they are wholly incompetent to create.

The chief grounds of persecution are as old as society itself; and if we hear little of it in early times it is because there was not enough resistance to call for any striking display of power. We may divide these grounds into tribal, political, theological, and social. A little examination will show us that theological persecution in the strict sense is of comparatively modern origin; while the arguments by which it has been sought, even in our own times, to defend restraints on opinion in a milder form present to us a softened and rationalized revival of the terrors in which the persecuting instinct has its oldest foundation. Let us take the first persecutions which have acquired a general historical importance, those of the Christians under the Roman Empire. The accounts we have are mostly imperfect or exaggerated, but we believe that the following general view is substantially correct. Christians were vaguely known to the multitude as a set of people who refused worship to the recognized gods, and to the rulers as a widely spread and spreading society whose affairs were governed by a self-appointed internal jurisdiction different from that of the State; whose ostensible objects were innocent, but trifling in proportion to the extent and organization of the society; and which, although no overt act against the civil authority could be laid to its charge, strictly

forbade its members to take the oath of allegiance in the ordinary form. To the vulgar Christianity appeared as a standing insult to the gods; to the instructed, as a standing menace to the Government. The prevailing ignorance as to what the doctrine and practice really were contributed an element of mystery which doubtless heightened the alarm. A Roman official of average intelligence must have looked on Christianity somewhat as a modern Prussian official would look on a combination of the Jesuits and the International. If we consider the persecutions that actually took place, we shall find that they proceeded chiefly from the vulgar but partly also from the instructed view of the danger. They were mostly connected with public misfortunes of some sort, as we learn both from the general history of the times and from the well-known passage of an early apologist. Men sought for an account of the famine, the drought, the pestilence, or the invasion of barbarians that had oppressed them; and the account was only too easily found. The new and unsociable sect, the despisers of Jupiter and doubtful subjects of Cæsar, were always with them. It was obvious that they had brought the wrath of the gods on the community which tolerated them, and the remedy was no less obvious. The injured honour of Olympus must be avenged, and then all would go well again: *Christianos ad leonem!* This is what we call the tribal motive of persecution. The community which lives under the protection of its peculiar and ancestral gods will forfeit that protection if it harbours persons who offend the gods by

refusing them the obeisance and propitiation expected by them as their due. The presence of a single heretic is a constant source of imminent danger to the tribe or city. From this point of view the removal of the danger,—in other words the forcible suppression of heresy,—is not merely justifiable, but a plain duty of self-preservation.

In cases of this kind the Christians often suffered from outbreaks of local superstition which the magistrates, or the Emperor himself if appealed to, discountenanced as far as they could. But they could not do so completely, superstition being not only violent, but having the law on its side.<sup>1</sup> This brings us to the political aspect of the matter. Where the gods are regarded as in a manner the most exalted officers of the State; where their protection is invoked on all public occasions, and religious ceremonies are intimately bound up with the outward frame and circumstance of military and civil institutions; where, in short, religion is incorporated into politics, any

<sup>1</sup> It might be difficult to ascertain for what specific offence the early Christians were proceeded against in every case. The Roman officials, apparently, did not always know themselves. Pliny's famous letter to Trajan asking for instructions is so confused in this respect that M. Aubé seriously disputed its genuineness in the first edition of his *Histoire des persécutions de l'Église*: he admits it in the second, though not without hesitation. The Christians, however, seem to have been legally exposed to punishment on three distinct grounds:—  
1. Introducing an unauthorized new religion to the disturbance of men's minds. (Paul. Sen. v. xxi. 2.) 2. Belonging to an unauthorized society. 3. Refusing the oath of allegiance. They were charged by the popular imagination, and sometimes probably by authority, with other various and monstrous crimes, including magic, which was a capital offence.

rebellion against the established gods is apt to be regarded as equivalent to treason against the established order of government. It is not conceived as possible that those who are hostile to the gods should not be equally hostile to the laws and institutions under their protection. The seditious intention will appear to the vulgar self-evident; the enlightened and conforming sceptic will consider that no one would take the trouble and expose himself to the danger of attacking the official religion unless there were some sinister political object behind his professed scruples. Accordingly we find that certain persecutions were undertaken by the Roman government as deliberate acts of State, if anything done in a panic may be called deliberate. To these a tolerable parallel may be found, allowing for the difference not only of the cases but of modern civilization and humanity, in the anti-Socialist legislation of the German Parliament and our own obsolete though not ancient statutes against secret and corresponding societies. The English anti-Papal measures of earlier times are not in point, as there was no mistake or mystery whatever as to the reality and character of the pretensions against which they were directed. The political intention on both sides was undisguised. In order to understand the Greek or Roman feeling on the subject, and the inference, which to us appears forced, of anti-social purposes from eccentric religious professions, we must remember that almost all guilds and private associations were united by some special tie of common worship and sacrifices. All societies were to some

extent religious, and a merely religious society was exceptional. It will be seen from the foregoing remarks that the political motive of persecution is, or may be, to statesmen what the tribal one is to the superstitious multitude; and as the multitude, even under a despotism, have some tincture of political ideas, and few statesmen are wholly free from the current superstitions of the time, we shall hardly ever find either motive without an intermixture of the other. The tribal motive, however, might be sole and sufficient among people not yet civilized enough to have any distinct political institutions. Any member of the tribe who disputed the necessity and efficacy of the medicine-man's incantations for the common weal, or spoke lightly of dreams and omens, would probably be knocked on the head without more ado: nor would the survivors be able to say distinctly whether the purpose of their summary justice was to preserve the favour of the gods, or the customs of the tribe, or both.

The civilization of Greece affords instances of persecution in which the tribal and political motives were almost equally balanced: we mean the treatment of certain of the præ-Socratic philosophers and of Socrates himself, which is not reckoned by history as a persecution because the number of victims was but small, and in only one case, though the most illustrious, was an extreme penalty inflicted. The main charge against Socrates was that he imported new deities; that was the form in which his offence hit the popular imagination. But there was also an uneasy feeling,

by no means confined to the ignorant, that the new brood of Sophists, of whom Socrates was the cleverest and worst, were unsettling the foundations of civil order. They went about questioning maxims for which nobody before them had sought a reason, and set their disciples questioning too. Their teaching "perverted young men." Moreover, there was at Athens a suspicion that philosophical study was in some way associated with oligarchic sympathies. As regards Plato and Xenophon, there was certainly some colour, or more than colour, of truth in the suspicion. But it is not insignificant that some time earlier Anaxagoras was accused of "Medizing" as well as impiety. On the popular side, again, pretensions to superior physical knowledge were regarded as a kind of sacrilege; to hazard conjectures as to what the sun and stars were made of was an indiscretion verging on blasphemy. The physical inquiries of Anaxagoras and the ethical and political inquiries of Socrates and others were, notwithstanding Socrates' own protests, hopelessly confused in the average Athenian mind, which satisfied itself with the broad conclusion that philosophers were a dangerous nuisance. Pericles was not only powerless to stop the anti-philosophic agitation, but was himself exposed to some danger from it; and this alone is ample proof that the movement was essentially popular.

The Greek persecution, such as it was, of philosophy, and the Roman persecution of Christianity, agree to a considerable extent in what their motives were, and still more remarkably in what they were

not. In neither case is there anything like the distinctly theological incitement to persecution which is given by dogmatic theories. The religions of Greece and Rome had legends and rites in exuberant abundance, but nothing that can be properly called dogma. When men come to hold that one set of religious beliefs is exclusively true, that adherence to it is a matter of supreme importance for each man's individual soul, and that the true belief is in their own possession, theological persecution in the strict sense becomes possible. The nature of its motives, and its justification from the theologian's point of view, are already implied in this statement of the conditions.

## II.

When religion was considered as a matter of public rather than private concern, the motives of persecution were naturally found in the order of considerations which we have called tribal and political. The wrath of the gods must be averted by the destruction of the blasphemers who provoked it; and the popular impulse to cast out the abominable thing was reinforced by the more astute reflection that, whether the gods really cared about it or not, persons who renounced the accustomed gods of the city could not be otherwise than bad citizens. Persecution on grounds of this kind is essentially a measure of public safety. In its petty forms it belongs to the class of useless and vexatious police regulations by which it is sought to enforce erroneous theories of public welfare. We may compare it with the old-fashioned formalities of

quarantine, or the machinery of protectionist legislation. In its more violent forms it is analogous to a political reign of terror. But in either case it is wrong, not merely because it aims at putting down particular opinions, but because it rests on mistaken assumptions. Whether those who promote it are morally to blame as individuals depends on their means of knowledge and the industry and intelligence with which they have used them. It was almost impossible for a Roman official of the second century, with the political ideas and training of his time, to entertain the opinion that Christians might safely be left alone.

The difficulty arises from the conflict of the old political conception of religion with the new individual or theological one. In the earlier stages of civilized history the tribal jealousy of strange gods is still active and potent. This was broken down by the increase of mutual traffic and the levelling cosmopolitanism of the Roman Empire; and the Pantheon became hospitable. The Greek or Roman who bore his part in the official ceremonies was free to use for his private edification (subject to such police regulation as existed, and to the general laws against unauthorized associations) any respectable form of worship that took his fancy. When a world which had thus established, as it seemed, an arrangement convenient and equitable to all parties was surprised by the Eastern idea of right belief as a thing of surpassing moment for each individual, it was unable to receive such a disturbing element without a violent



shock. There was no strength left to withstand it, and Oriental ardour triumphed over the intellect of the Roman world. It might have been expected, perhaps, that the modern doctrine of liberty of conscience should have been among the first-fruits of a system in which the responsibility of the individual soul for its belief was brought into unwonted prominence. But this was not the case. A brief and fitful gleam of toleration appeared at a time when the victory was yet in suspense, but only to be forgotten as soon as victory was assured. When the new theory of religion was once fully established, it lost no time in producing a new theory of persecution: not that the older motives, at least the popular one, by any means lost their force.

If the authority of princes and rulers is divine, and if salvation is more important than any temporal interest, and the duty of saving one's soul paramount to all others, it is the manifest duty of princes and rulers to do what they can to ensure the salvation of their subjects. Further, if holding the true faith is essential to salvation, and the one true faith is known to be in the custody of the Church, it follows that the prince must support the Church at all hazards in preventing his subjects from holding any other. The undertaking may be difficult, but is not impossible; and a prince who really holds the Church's view of human salvation is bound to go through with it if it is possible at all. It is easy to say that opinion cannot be coerced. But this, in the first place, is true only of the small minority of mankind who are

in the habit of thinking for themselves; and, secondly, if it were true it would only show that in some cases persecution is too late to be effectual. Not cure but prevention is the main object. A disease may be incurable as to the individual it has once fastened on, and yet the infection may be cut off by sanitary police or stamped out by slaughter. If heretical opinions are damnable, and the infection of them dangerous to the soul, the best thing the prince can do is to contrive, as far as in him lies, that his faithful subjects shall have no opportunity of hearing them. The readiest way of doing this is to make heresy a crime, and inflict penalties on all persons who either publish or willingly listen to anything contrary to the Catholic faith. And if heresy be a crime at all, it is plainly a crime of the most heinous kind. Every heretic is a centre of infection and corruption infinitely more deadly than any physical pestilence. Even if his own soul is stubborn beyond saving, the souls of his innocent neighbours are in constant danger because of him. And if temporal welfare is indeed of no account in comparison of spiritual, no limit whatever can be assigned to the measures of repression to which an orthodox ruler should commit himself. Better a depopulated wilderness than a garden cultivated by heretical hands; better a poverty-stricken remnant of the faithful than an outwardly prosperous multitude sitting in the darkness of mortal error and under an eternal ban. Extermination is the only true mercy: for every life that is spared many souls may be lost. It is useless to say to the

persecutor that if the truth is on his side it will surely prevail in the end. Such an argument might be allowed on a question of mere human knowledge; but no delay is admissible where souls are to be rescued from certain perdition. How many poor ignorant men may not be hopelessly led astray while the doctors are exposing the fallacies of a new heresy? and do we not know that heretics are encouraged by the devil to a pitch of obstinacy which is proof against even the elements of Catholic truth? The case for theological persecution is unanswerable if we admit the fundamental supposition that one faith is known to be true and necessary for salvation. The case against persecution is that the persecuting Sovereign must take the risk of this supposition being unfounded. To Isabella the Catholic and Philip II., and to Catholic princes and clergy in general down to a much later time, it never occurred that such a risk existed. To most persons at this day it appears too tremendous for any human being to support. Even among devout Catholics there are probably very few who really think it inappreciable. Again, the preservation of the faith uncontaminated by heretical influences is, on the thoroughgoing Catholic hypothesis, a blessing for which no price can be too high. But to the common apprehension of mankind the hypothesis cannot be verified; while the cost of rooting out heresy is visible in the present world. That cost appears to be terrible in direct proportion to the success of the operation. Spain is the one European country in which the policy of extermina-

tion has been consistently applied for a time long enough to produce its full results. For once the Church and the Inquisition had unbounded scope. The Moors and the Jews were expelled; even the suspicion of Judaizing or heresy was more dangerous than treason; the Catholic faith reigned without the shadow of a rival from the Pyrenees to the Atlantic, and Spain was politically and intellectually ruined. Similar consequences, though on a far lesser scale, may be distinctly traced to the revocation of the Edict of Nantes, the most modern instance of theological persecution deliberately designed and rigorously executed.

It is probable, however, that no ecclesiastical persecution, not even under the Spanish Inquisition, was ever unmixed as to motive or perfectly consistent in its conduct. Even the most fanatical of temporal and spiritual rulers are apt to be in some little degree better than their creeds; and, on the other hand, they have had other reasons for persecuting besides theological ones. The Inquisitors doubtless thought that in burning heretics they were vindicating the honour of God as well as preserving the souls of the people; and this is only a refinement of the old tribal feeling that the heretic is a curse to the land, which is by no means extinct even now in Catholic countries. The periodical massacres of Jews which disgraced every country in Europe in the Middle Ages were partly due to this feeling; and it is notable that they were mostly not official but popular. In some cases both civil and ecclesiastical authorities endeavoured

to restrain the mob, and endeavoured in vain. In this respect, as also in respect of the monstrous charges eagerly caught up by the multitude as a reason for outrage, the position of the Jews in Catholic Europe was very like that of the Christians in the first two centuries of the Church. But the Jews were victims not merely of superstition, but of the coarsest kind of jealousy. They added to the crime of infidelity that of being, in spite of vexatious and oppressive laws, richer and more clever than their neighbours. Superstition engendered hatred; envy inflamed it; and envy, hatred, and the lust of plunder fell back on superstition for an excuse. In England the Jews, before their expulsion by Edward I., were treated as a preserve of the Crown, and their religious perversity, and the other crimes associated with it by vulgar belief, were used simply as a pretext for extortion. It is observed by a writer of the last century that the Jews were not accused of murdering Christian children except when the king was in great want of money.

In modern times religious and ecclesiastical controversies have become inextricably mixed up with political ones, and so long as theological persecution was esteemed a respectable motive, it was even found convenient to put it forward as a disguise or justification for animosities which were in truth merely political. It is barely needful to mention, as instances in English affairs, the association of Anglicanism with the cause of the Crown, and Puritanism with that of the Parliament, or the conjunction in the following

century of the Pope with the Pretender. And if Protestant supremacy had been doubtful at the end of the sixteenth century, the Spanish Armada, a gigantic and sinister hybrid of theological and political ambition, would have sufficed to make it certain.

At present theological persecution is generally discredited, partly by force of reason, but still more by force of circumstance. The continued existence of Protestant kingdoms has been enough to make it look not only shocking but absurd; and Catholic and Protestant rulers, finding a system of perpetual reprisals intolerable, were practically compelled to allow existence on some terms to citizens who did not accept the prevailing religion of the State. When once heretics are suffered to live, and the principle of toleration is so far established that the terms and conditions of it can be discussed, persecution is driven from its high theological ground. The State admits that there are limits within which religious belief is an affair not of certainty but of probable opinion; and the repression of religious opinion, so far as it survives, must be maintained, not as a necessity of spiritual welfare, but by reasons of social expediency. Ecclesiastical fury is no longer armed with fire and sword, and the jurisdiction over opinions passes, in a mild and comparatively reasonable form, to the civil magistrate.

### III.

The severer forms of persecution can, as we have seen, appear justifiable only when the extermination of heretics is believed to be necessary either for the

purpose of averting divine wrath from the community or to preserve the souls committed to the Sovereign's charge from the danger of a fatal infection. We now have to consider a state of things in which such beliefs no longer prevail. It might seem on first sight that with their disappearance all plausible grounds of persecution had also vanished, and that the continuance of it in milder forms, which has everywhere preceded the introduction of complete toleration, and is far from having wholly ceased, must be regarded as an irrational compromise between the old principle of unqualified repression and the new one of religious liberty. It is true that man, though he could not be political without being rational, is never completely rational in his political action ; and it is doubtless the fact that compromise of this kind has its share in the partial preservation of compulsory and restrictive laws on religious matters. But it is only a share, and not the principal one. No sooner does the case for persecution fail on the theological ground than a fresh one is taken up within the region of temporal considerations ; and the position, if more confined than that which has been abandoned, is all the more defensible. Absolute knowledge of revealed truth and jurisdiction over consciences are no longer claimed : but it is affirmed that the public weal does not suffer certain doctrines to be openly disputed.

The civil or social reasons, as we have called them, in favour of moderate persecution, may be presented thus. It is conceded that individual citizens must

take care of their own souls, and that strict theological uniformity cannot be enforced. But there is a certain amount of fundamental religious doctrine, common to all or nearly all persuasions, and essential for the maintenance of morality and civil order. Whoever does not believe this much has no rational motive for being a good citizen or a good man : whoever shakes these accepted beliefs is to that extent endangering the stability of the commonwealth, and is just as much to be restrained as if he directly incited his neighbours to wickedness and sedition. For this purpose it becomes needful to impose penalties that shall be sufficient, but not more than sufficient, to secure a decent observance for the elements of religion on which the welfare of society rests. The offence will consist not in entertaining difficulties of conscience on the most important points of belief, nor in the discreet and private discussion of them, but in openly controverting the received opinions : the gist of it will be, in the language of an Act of William III., “ writing, printing, teaching, or advised speaking.” This Act is worth studying as a specimen of the manner in which legal persecution is transformed. The preamble recites, in ungrammatical but not obscure language, that “ many persons have of late years openly avowed and published many blasphemous and impious opinions contrary to the principles and doctrines of the Christian religion ”—not of the Church, be it observed : the Christian religion is tacitly assumed to be the common possession of several denominations of Christians. These opinions are further described as “ greatly



tending to the dishonour of Almighty God,"—here the old tribal superstition is expressed in a generalized form,—“and may prove destructive to the peace and welfare of this kingdom:” not to the salvation of souls; the Legislature no longer provides for that; but to the peace and welfare of the kingdom. “Wherefore, for the more effectual suppressing of the said detestable crimes,” it is enacted that any person “who shall, by writing, printing, teaching, or advised speaking, deny any one of the Persons in the Holy Trinity to be God, or shall assert or maintain that there are more gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority,” shall, on conviction by two witnesses, be disabled from holding any public office for a first offence, and incur sweeping civil disabilities and three years’ imprisonment for a second. Note that the penalties, excessive as they are, have a purely civil character, and do not extend to life or limb. There is a qualification which has the effect of excepting unconverted Jews, Turks, and heathens, presumably because they cannot be expected to know better, and there are not enough of them to affect the public welfare in any sensible degree by such disputes as they may enter upon with their orthodox neighbours. It seems clear that the severity of the statute outran public opinion; for no instance is known of any one having been prosecuted under it, though ample occasion was afforded by the Deistic writers of the eighteenth century. But its existence was not wholly forgotten. Early in the

present century it was discovered that Unitarians were not in any way dangerous to the peace and welfare of the kingdom, but were very decent, well-behaved, and well-to-do people; and accordingly the penalties were repealed for their benefit, so far as concerned persons denying the Trinity.

This last incident marks a weak point in the social theory of persecution. It suggests that the legislator's estimate of the indispensable elements of belief which support the welfare of society is more or less precarious. In this case there is no mixture of substantial political reasons, such as we have noticed before, and may notice again. No one ever supposed that Socinians or Unitarians were dangerous to the State, except so far as their denial of the Trinity was equivalent to denying the foundations of religion and morality. The peril of allowing their doctrines to be openly maintained, whatever it might be, could not well have diminished in the interval between William III. and the Regency. Yet under the Regency, at a time by no means favourable in other respects to speculative novelties or to the relaxation of restraints, the Legislature had become convinced that the danger was infinitesimal. Parliament had taken the risk of being wrong—a risk which might have issued in depriving the country of the services of many good citizens if public opinion had not been wiser than Parliament: and after the experience of something over a century, Parliament formally admitted that it had been wrong. But when the possibility of error is once allowed, we cannot say within what limits it is possible. Absolute

bounds can be set to the scope of probable opinion only if you have an infallible authority to set them. Therefore, if the risk of error is not in its nature so formidable when persecution confines itself to moderate civil penalties as when it proceeds on the theological principle of extermination, yet it is implied in the theory of moderate persecution itself that the risk does exist.

Nevertheless all government and legislation whatever are founded on no surer base than probable opinion ; and in order to show that repressive legislation is wrong, it is not enough to show that it may possibly be mistaken. We must be satisfied either that the assumption on which it proceeds,—namely, that the publication of certain opinions is dangerous to society,—is not tenable, or that, if that assumption be taken as true, legislation of the kind proposed is not fitted to attain the desired end. But those who object to repression are, as relates to the conditions of the argument, in a better plight than those who maintain it. For their purpose is served if they can make out either branch of the alternative ; whereas the advocate of restriction has a double burden of proof on him. He must show that the alleged dangers are real, and also that legal restraints will effectually provide against them. These are issues which can be decided only on the ground of experience ; and experience has, in fact, given a tolerably clear answer upon both branches of the question.

First, the policy of limited restraint has had a fair trial for upwards of two centuries in the most civilized

countries of the world, and there can be no doubt that it has failed. Notwithstanding the direct and indirect penalties which recently were or still are attached to various manifestations of heterodoxy, people who really cared to publish heterodox opinions have found but little difficulty or inconvenience in so doing, so long as they used decent language and otherwise conformed to the ordinary law of the land. Probably it has oftener been the desire to spare good men's feelings and avoid controversial scandals than any dread of surviving legal sanctions that has induced heterodox writers in late years to express their speculations in guarded, respectful, or even ambiguous terms. At present it is certain that in all the Western nations the public discussion of the most fundamental religious questions is practically free: nor is this such a new thing as many people suppose. Ever since the theological theory of persecution disappeared, freedom of speech has been in great measure enjoyed by any one who would use a certain amount of prudence and precaution. The difference between this century and the last is not so much in the boldness of particular publications as in the general tone of society and literature. The necessary precaution is now reduced to a minimum, and may be said to consist in nothing more than the observance of good manners. Yet, with the slight exception already noticed, the law has remained unaltered. Nor is it open to those who may be dissatisfied with the result to say that if the law is ineffectual it should be made more stringent. In England it is nominally very stringent already, and the

fact is that public opinion does not allow it to be enforced. The proposal is not even admissible in theory. From the theological point of view penalties for heresy may be increased without limit; but from that of secular expediency the limit of the severity which can appear reasonable is very soon reached. If the civil magistrate, acting on grounds of civil welfare, is unable to suppress heresy by treating it as a simple misdemeanour, he may as well renounce the hope of suppressing it at all.

The same experience which shows petty persecution to be ineffectual has also shown its purpose to be misconceived. Heterodoxy has had by this time a scope quite sufficient to display the mischievous results of toleration. Where are those results? The foundations of morality have not been weakened; the practice of it has not ceased; respect for the law has not diminished; society is not on the brink of dissolution. The civilized commonwealths of the world are not on the whole less orderly, less prosperous, or less flourishing in any way than they were two centuries ago. The disturbances and discontents that have arisen from time to time are traceable to natural and political causes. Orthodoxy can allege with confidence only one evil consequence—namely, that heterodoxy and unbelief have increased. To an orthodox beholder this is, of course, the greatest of evils; but whether it should be an evil in the eyes of the civil authority, which by the hypothesis is to judge of beliefs only by their fruits in action, is the very matter in question.

The theory of limited persecution for the sake of public welfare is so far stronger than the older ones that it rests on grounds capable of being tested by experience, not on assumptions about the conduct of supernatural Powers. It cannot be summarily dismissed as irrational; but when the test of experience is applied, it is found to break down. Laws of this kind do not work, and no harm appears to come of their not working. The collateral evils of retaining nominal penalties and restrictions with which public feeling is not in accord have often been exposed, and it is needless to speak of them here. The condemnation of direct penalties for heresy involves the condemnation of all indirect ones which may be imposed by way of condition or disability; for example, treating a man as unworthy of belief in a court of justice because he declines to take an oath in a particular form, or does not accept particular doctrines. This principle has been acknowledged, though tardily, by modern legislation and practice. What is here said as to the inutility of legal persecution applies with much the same force to the more subtle and really more formidable restraints which the usage of society can impose on private conversation. As the law in its modern tendency and operation, if not as yet in its form, regards not doctrine but only decency and the public peace, so must the exchange of opinion in social intercourse ultimately be limited only by the rule of good manners, gentleness, and respect for the feelings of those present, which equally governs conversation on all topics.

There are still divers forms of restraint on conduct and language which, though they are or may be connected with religion, and may tend to impede the manifestation of religious opinions, do not aim in the first instance at that object. Whether these can be dispensed with demands a separate inquiry.

## IV.

Persecution has frequently been the ally of political ambition, the chief moving part in the business belonging sometimes to the one and sometimes to the other evil spirit. Ecclesiastical zealots have purchased the support of temporal arms by promises of temporal gain in sovereignty and possessions; and princes have generally been eager in the detection of heresy in proportion to the immediate advantages which might be expected from the confiscation of the heretic's worldly goods. The crusade against the Albigenses developed or degenerated (it is of little importance to be accurate in the degrees of infamy) into a war of mere territorial conquest. And in a later age the Spanish conquerors in America made the advancement of true religion their pretext for rapine and cruelty which excited hardly less indignation in Catholic than in Protestant lands. But there are cases of another kind in which acts bear a certain appearance of religious persecution which in truth belong chiefly or wholly to secular policy or jurisprudence, and are to be upheld or condemned on grounds independent of religious opinion.

Thus the severities exercised against the Jesuits

under Queen Elizabeth, whatever may be thought of their justice or expediency, were not in the nature of a religious persecution. The Queen's Government determined to treat the Jesuits as enemies of the State, not because they believed in purgatory and the invocation of saints, but because they taught English citizens that the Pope could dispense them from their allegiance. And the imposition of special disabilities on Roman Catholics which continued so long afterwards was founded partly on the apprehension that anarchical doctrines of this kind still were or might be laid down by the authorities of the Roman Church, but still more on the subsequent experience of a critical period in which the official influence of that Church had been used against the liberties of England. More clear and simple instances, however, will be found in later times; and they will be the more instructive as the justice of the acts in question is hardly open to doubt. The British Government in India professes to regard the native religions with indifference, neither encouraging nor discouraging any one of them. But we have put down the practice of widow-burning, in spite of the strong religious sanction it had obtained: not because we wished to enforce any particular theory as to the spiritual condition or duties of Hindú widows, but because a system of compulsory suicide was too contrary to the first principles of justice and humanity to be tolerated by a civilized government. It may seem a strange reversal of the ancient relations between persecutors and persecuted that the conceivable forms of persecu-



tion should include forbidding persons to burn themselves. But fanaticism can persuade men to anything; and there is little doubt that not only the Brahmans, but a certain number of the widows themselves, were aggrieved by the prohibition. Again, we suppressed the sect of Thugs, not for being devotees of the goddess Kálí, but because their devotion assumed the form of organized murder and highway robbery. It is beyond all question that they were sincere in their unique superstition; and the procedure of the British Government differed from persecution only in being directed, not against opinions as such, but against the actual crimes produced by them. At home we have to deal with the Peculiar People, who deliberately omit to procure medical attendance for their children on a supposed ground of religious obligation; and they no doubt consider themselves persecuted when they find that if the children die the result of the parents' following of their peculiar religious lights is a prosecution for manslaughter. The law is not concerned with the interpretation of the passages of Scripture relied on by the Peculiar People, nor does it interfere with any endeavours they may make to persuade as many of their neighbours as they can, and ultimately Parliament, to adopt the same interpretation. But in the meantime they are not free to act upon it; for it is settled by the law of England, on grounds independent of particular religious beliefs, that it is a father's duty to provide necessaries for his children, including medical attendance when required; and while the law is such it must be enforced.

Provisions relating to the maintenance of an established Church are of a mixed religious and political kind. They may be a cloak for persecution, but they may also stand together with a very wide toleration of opinions. In fact, there was a time when writers who advocated freedom of thought and speech to the full extent assumed it to be a matter of political necessity that there should be some form of public worship specially ordained by law, and enjoying some sort of legal preference and privileges. The reasons for and against keeping up relations of this kind between Church and State—at least those which in our time can be used with any effect—are but remotely connected with the general political doctrine of toleration. But the intimate connexion between civil and ecclesiastical polity which was once universal, and is now relaxed only in the most advanced of civilized countries, has greatly contributed to maintain the belief that civil morality depends on religious opinions. In the first instance the State had no choice whether to be associated with the Church or not. The Church was a power not merely co-extensive with the State, but more extensive and better disciplined than any single State or any possible alliance of States. And when the State became strong enough to go alone, it was so thoroughly committed by habit and precedent to supporting the Church that statesmen easily brought themselves to regard the alliance which had once been a condition of the State's existence as a thing to be continued from deliberate choice and policy. When men are discontented with the government they live

under, and the Church is presented to them as a part of that government, their anger is for many reasons apt to be most strongly drawn towards the Church. And the probability of this will be the greater in proportion to the amplitude of ecclesiastical claims ; for an institution which pretends to have superhuman powers confided to it, and to exercise them under supernatural guidance, cannot expect those allowances which are tacitly made by all reasonable men for the necessary infirmities of their governors. Repugnance to the established order in things ecclesiastical manifests itself in divers ways, according to times and circumstances. Where it stops short of actual commotion, it may be expected to assume the form either of bitter sectarianism or of coarse and violent denial of all religion whatever. Distinctions between speculative tenets and the discipline by which it is sought to enforce them are not always easily made by educated men, much less by those on whom the weight of ecclesiastical jurisdiction chiefly presses. But in such troubles the Church finds a new opportunity. Men become heretics or infidels because they are disgusted with the behaviour of the officers who represent the Church, or because they hold themselves wronged by an established order of things which the Church officially supports. It is both natural and convenient for Churchmen to invert the real order of cause and effect, and assign the origin of every general disorder to the heresy or infidelity which is in truth only a symptom of it. The political distress may perhaps be represented as a divine judgment on heresy, or, at any

rate, it will be pointed out to the civil authorities that they have another conclusive instance of the manner in which free-thinking breeds sedition, and a plainer demonstration than ever how nearly the interests of society are bound up with those of the established religion.

We have said nothing as yet of the punishment by law of blasphemy as distinguished from heresy. Formerly the distinction was only one of jurisdiction—blasphemy being a matter of temporal, heresy of ecclesiastical, cognisance. In England it is believed that blasphemy, as a distinct offence, was invented by the judges of the King's Bench about the time when the power of the ecclesiastical courts was cut short. At that time it meant nothing more than the distinct expression of opinions contrary to the established ones. The statute of William III. which we have already cited proclaims by its title the intention of suppressing "blasphemy and profaneness;" but indecency of manner is not an ingredient in the offence. "Advised speaking" against orthodox doctrine is to be punished, whether temperate or not. And the common law was understood to be to the same effect. But at this day we should never think of calling a serious and decently worded argument blasphemous. The simple denial of cherished doctrines may shock a believer's religious feelings; but what we mean by blasphemy is language which denies with studious insult, or insults without caring to deny. Now it is a broad fact of human nature that, next to men's own persons and families, their religion is the point where

they are most easily touched ; and it should seem that wanton offence on that point is no less fit to be punished by the law than attacks on personal honour and reputation. Where strife between people of different religions or sects is common, it may be necessary for the lawgiver, looking simply to the preservation of the common peace, to forbid mutual insults of this kind with some stringency. This has been done by the Indian Penal Code in perfectly impartial and general terms.

If a certain belief is notoriously professed by a great majority of the people, gross and wanton attacks upon it will presumably give widespread offence and pain, and it may be fair enough to punish them without requiring proof that individuals have been in fact offended. This is the modern rationalized theory of the English law of blasphemy, which is made possible by the vagueness of the early authorities. When it is said that Christianity is parcel of the law of England, this would naturally mean that the law of England regards a certain set of religious doctrines as true, and makes it a crime to deny them even in becoming language ; and this was no doubt the original intention. But it can also be made to mean that the law, taking note of the fact that most Englishmen are professed Christians of some denomination, will not suffer the Christian religion to be assailed with gross and indecent vituperation. And there is fortunately no positive decision which binds an English lawyer to hold that the sober and serious expression of heterodox opinions must by the common law be deemed a

crime. A law thus limited is reason itself compared with what it has been evolved from ; but it is less rational, less comprehensive, and more liable to abuse, than such a general provision as that of the Indian Code. It is difficult to see why only the prevailing religion should be protected. There are many Jews and very few Buddhists in England. But it seems to us that those Buddhists are no less entitled to be secured against hearing gross abuse of the Buddha than the Jews are to be secured against hearing gross abuse of Moses.

The draft Criminal Code Bill of 1878-9 proposed to make the publication of blasphemous libels an offence. The task of defining a blasphemous libel was wisely not undertaken except in a negative sense. There is a proviso that statements or arguments used in good faith are not of themselves to be punishable. Subject to this, the character of the publication is left to be dealt with as a question of fact in each case. Juries would thus have the same power that they already have by statute in other cases of criminal libel, and for the same purpose, to ensure the administration of the law being fairly in harmony with public opinion. But public opinion may now and then be carried away by a panic ; and although the proviso is distinct enough, we can imagine circumstances in which it would not give much security against perverse and oppressive verdicts. It would perhaps be desirable to require the action or consent of the Attorney-General for prosecutions of this kind.

The general result of the considerations set forth

in this essay has been to show that persecution has been practised on several distinct grounds, some of which we can now see to be unreasonable in themselves, as assuming absolute knowledge on subjects of which little or nothing can be known ; while others are of a far more plausible character, and can be effectually set aside only by the teaching of experience. We may sum up the argument from experience by saying that persecution is found to succeed only when pushed to extremes ; that when it succeeds the consequences are, in a temporal point of view, most mischievous, and when it fails the only harm that comes of it (which, however, may be great) is the disaffection and irritation produced by the attempt. General arguments concerning the sanity of individual opinions as such, or of religious opinions above others, are of little use ; for the various theories of persecution deny the premisses on which these arguments are founded. It is not the demonstration of abstract right, but the experience of inutility, that has made governments leave off persecuting. We must always be careful, moreover, to distinguish from persecution those measures of temporal police, often perfectly just and necessary, which bear a superficial resemblance to it.

## VII.

## THE OATH OF ALLEGIANCE.

THE natural history and antiquity of oaths in general were discussed some time ago by Mr. E. B. Tylor,<sup>1</sup> and those who desire to inform themselves or refresh their memories on the wider bearings of the subject cannot do better than turn to his article. Mr. Tylor has, among other interesting points, made it all but certain that our English formula, "So help me God!" is of Scandinavian and præ-Christian origin; a discovery which throws an unexpected light on the much abused dictum that Christianity is parcel of the common law of England, and the proposition confidently advanced at a later time that the oath of allegiance taken by members of Parliament is in some way (notwithstanding the removal of Jewish disabilities) a bulwark of the Christian religion. This statement, however, errs only in generality and in being out of date. It is perfectly true that the oath of allegiance was, down to the Catholic Emancipation, one of the chief statutory defences of the Protestant religion, though in a political rather than a theological sense; and for many years later it contained a promise to maintain and support the Protestant succession to the Crown as limited by the Act of Settlement.

<sup>1</sup> *Macmillan's Magazine*, "Ordeals and Oaths," May, 1876.



The history of the oaths of allegiance and supremacy and of the various transformations they have undergone is a varied and complex one ; and I now invite the reader, if he is interested as a lawyer in a half forgotten chapter of legislation, or as a historical student in the minute curiosities of constitutional history, or, as an observer of things at large from the Darwinian point of view, in the birth, development, and degeneration of institutions, to trace with me the thread of this story as it may be picked out from the Statutes of the Realm.

Before we go back to the beginning, it may be as well to look at the end. As late as 1868 the oath of allegiance was reduced by the Promissory Oaths Act to its present simple, not to say meagre, form, which stands thus :—

I,           , do swear that I will be faithful and bear true allegiance to her Majesty Queen Victoria, her heirs and successors, according to law. So help me God.

What the substance of the oath as thus reduced may amount to would not be a very profitable question to discuss at large. It certainly does not promise anything beyond what is at common law the duty of every subject, and it seems to follow that it could not be broken except by some act which was otherwise an offence at common law, for example, treason or sedition, or perhaps also the vaguely defined offence of disparaging the dignity of the Crown. And it seems at least a tenable view that the words “according to law” not only express the limit within which the Crown is entitled to obedience, but cover the possi-

bility (a possibility, fortunately, of the most remote kind) of the course of succession being legally varied.<sup>1</sup> Such is the bare residue of the formidable and elaborate fabric of oaths and declarations raised up by Parliaments of former generations against the Pope and the Pretender. We say against the Pope and the Pretender; for our modern oaths of allegiance are of statutory devising, and date from Henry VIII.'s assertion of the Crown's ecclesiastical supremacy as against the see of Rome. The earliest point of history we have to observe is of a distinguishing kind, namely that the modern oath of allegiance is a thing apart from the older oath of fealty, though formed on its analogy. Side by side with the fealty due from a man to his lord in respect of tenure, there was recognized in England, it would seem as early as the tenth century, an obligation of fealty to the Crown as due from every free man without regard to tenure.<sup>2</sup> Sometimes we find mixed or transitional forms. Thus there is preserved among the so-called statutes *temporis incerti* an oath taken by bishops which, translated, is as follows:—

<sup>1</sup> There is, I conceive, nothing in law to prevent the Crown, by and with the consent of the Estates of the realm, in the ordinary form of an Act of Parliament, and with the advice of responsible Ministers, from repealing or amending the Act of Settlement. In the event of its appearing likely that there should be a failure of the persons thereby defined as capable of succession, amendment would become necessary; for example, if they should not be or should cease to be Protestants (see p. 190).

<sup>2</sup> It is remarkable that in the Assize of Northampton (1176) the justices are directed to take the oath of fealty even from "rustics:" "Item Justitie capiant domini regis fidelitates . . . ab omibus, scilicet comitibus, baronibus, militibus et libere tenentibus, *et etiam*

I will be faithful and true, and faith and loyalty will bear to the king and to his heirs kings of England, of life and of member and of earthly honour, against all people who may live and die ; and truly will acknowledge, and freely will do, the services which belong to the temporality of the Bishoprick of N., which I claim to hold of you, and which you render to me. So help me God and the Saints.<sup>1</sup>

This bears considerable generic resemblance to the modern oath. But it is not simply an oath of allegiance in the modern sense : it includes an oath of fealty in respect of a specific tenure, namely for the temporalities of the see holden of the Crown. This is made more evident by comparison of the common forms of a free man's homage and fealty :—

I become your man from this day forth, for life, for member, and for worldly honour, and shall bear you faith for the lands that I claim to hold of you ; saving the faith that I owe unto our lord the king. . . I shall be to you faithful and true, and shall bear you faith of the tenements I claim to hold of you, and loyally will acknowledge and will do the services I owe you at the times assigned. So help me God and the Saints.

Moreover, the ceremonies of homage and fealty have in no way been abrogated or superseded by any of the

*rusticis, qui in regno manere voluerint.*" Does this include men who were not free ? In the earliest forms of the oath of fealty to the king, both in England and elsewhere, the promise was to be "*fidelis sicut homo debet esse domino suo.*" Allen (*Royal Prerogative*, pp. 68-71) thinks this was a limitation of the subject's obedience, or reservation of his right to throw off allegiance if the king failed in his duties, and this is probable. But the words would likewise operate in the king's interest by adding the stricter personal bond of homage to the more general obligation of fealty.

<sup>1</sup> Bishops *after* consecration swore fealty only ; but on their election, and before consecration, they did homage. Glanvill, Lib. 9, cap. 1, *ad fin.*

statutes imposing political oaths. An oath of homage is to this day taken by archbishops and bishops, in a somewhat fuller form than the old one above cited. An oath of fealty is stated in our law-books of the thirteenth century to be required from every one attending the sheriff's tourn, and Coke speaks of it, in Calvin's case, as if it had been still in use in his time.<sup>1</sup> There appears no reason why this oath of fealty should not in theory still be due from every subject at common law, though it would be doubtful who had authority to administer it, and what would be the legal consequence, if any, of a refusal to take it.

Shortness of time and space, however, forbid the further discussion of the doctrine or history of allegiance at common law. We must pass on to the additional obligations imposed by a series of statutes, from which the oath of allegiance in its existing form and application is lineally derived.

In the spring of 1534, when the last hopes of a reconciliation with Rome were exhausted, there was passed "An Act for the Establishment of the King's Succession" (25 H. VIII. c. 22), the objects of which

<sup>1</sup> Strictly there is not any oath of homage distinct from the oath of fealty. The oath was always an oath of fealty, and the duty of homage, where it was present, carried with it the duty of swearing fealty to the lord. On the other hand there might be, and often was, fealty without homage. Allen, p. 62. Cp. Hargrave's and Butler's notes on Co. Litt. 68 a. Homage was the privilege of the freeholder, being "the most honourable service, and most humble service of reverence, that a franktenant may do to his lord." Litt. s. 85. As to the common-law duty cp. Selden, *Table Talk*, s. v. "Fathers and Sons, "Every one at twelve years of age is to take the oath of allegiance in Court-leets [*sic*] whereby he swears obedience to the king."

were to declare valid the king's marriage with Anne Boleyn, and to limit the succession of the Crown to his issue by her. It also enacted that all subjects of full age should make a corporal oath that they would "truly, firmly, and constantly, without fraud or guile, observe, fulfil, maintain, defend, and keep, to their cunning wit and uttermost of their powers, the whole effect and contents of this present Act." The oath was not further specified in the Act itself, but a form was at once prepared and used, and was expressly authorized by statute in the next session (26 H. VIII. c. 2). This, as the earliest specimen of its kind, deserves the honour of being given in full with the original spelling:—

Ye shall swere to beare faith truth and obedience alonely to the Kynges Majestye and to his heires of his body of his moost dere and entierly belovyd laufull wyfe Quene Anne begotten or to be begotten, And further to the heires of oure said Soveraign Lorde accordyng to the lymytacion in the Statute made for suretie of his succession in the crowne of this Realme mencioned and conteyned, and not to any other within this Realme nor foreyn auctorite or Potentate; And in case any othe be made or hathe be made by you to any persone or persones, that then ye do repute the same as vayne and adnychillate; And that to your connyng wytte and utter moste of your power without gyle fraude or other undue meane you shall observe kepe mayntene & defende the saide acte of successyon, and all the hole effectes & contentes therof, and all other actes and statutes made yn confirmacion or for execucion of the same or of any thyng therin conteyned; and this ye shall do ayenst all maner of persones of what estate dignyte degree or condicion so ever they be, And in no wyse do or attempte, nor to your power suffre to be done or attemptid, directly or indirectly any thinge or thinges prively or appartlye to the lette hindraunce damage or derogacion therof or of any parte of the same by any maner of meanes or for any

maner of pretence ; So helpe you God all Sayntes and the Holye Evangelystes.

Within two years the calamitous end of the marriage with Anne Boleyn brought about a new " Act for the Establishment of the Succession of the Imperial Crown of this Realm " (28 H. VIII. c. 7), which, after repealing the former Acts and making minute provision for the descent of the Crown, appointed a new oath of allegiance, and declared that refusal to take it should be deemed and adjudged high treason. There is no variation worth noticing in the form of words, save that Queen Jane is substituted for Queen Anne. In the same session (c. 10) there followed an Act " extinguishing the authority of the Bishop of Rome," which introduced a special oath of abjuration. The preamble is a notable specimen of the inflated parliamentary style of the time. It sets forth how " the pretended power and usurped authority of the Bishop of Rome, by some called the Pope . . . did obfuscate and wrest God's holy word and testament a long season from the spiritual and true meaning thereof to his worldly and carnal affections, as pomp glory avarice ambition and tyranny, covering and shadowing the same with his human and politic devices traditions and inventions set forth to promote and stablish his only dominion, both upon the souls and also the bodies and goods of all Christian people ;" how the Pope not only robbed the King's Majesty of his due rights and pre-eminence, " but spoiled this his realm yearly of innumerable treasure ;" and how the king and the estates of the realm " being overweared

and fatigated with the experience of the infinite abominations and mischiefs preceding of his impostures," were forced of necessity to provide new remedies. The oath of abjuration was to be taken by all officers, ecclesiastical and temporal, and contained an undertaking to "utterly renounce refuse relinquish or forsake the Bishop of Rome and his authority power and jurisdiction."

In 1544, however, it had been discovered that in these oaths of allegiance and supremacy, though they seem to a modern reader pretty stringent and comprehensive, "there lacketh full and sufficient words;" and in the Act further regulating the succession to the Crown (35 H. VIII. c. 1) occasion was taken to provide a new consolidated form to replace the two previously appointed oaths. This is very full and elaborate; some of its language survived down to our own times, as will be seen by the following extract:—

I, A. B., having now the veil of darkness of the usurped power authority and jurisdiction of the see and Bishop of Rome clearly taken away from mine eyes, do utterly testify and declare in my conscience that neither the see nor the Bishop of Rome nor any foreign potentate hath nor ought to have any jurisdiction power or authority within this realm neither by God's law nor by any other just law or means . . . and that I shall never consent nor agree that the foresaid see or Bishop of Rome, or any of their successors, shall practise exercise or have any manner of authority jurisdiction or power within this realm or any other the King's realms or dominions, nor any foreign Potentate, of what estate degree or condition soever he be, but that I shall resist the same at all times to the uttermost of my power, and that I shall bear faith truth and true allegiance to the King's Majesty and to his heirs and successors . . . and that I shall accept repute and take the King's Majesty, his

heirs and successors when they or any of them shall enjoy his place, to be the only supreme head in earth under God of the Church of England and Ireland, and of all other his Highness' dominions. . . .

Refusal to take the oath is, as before, to subject the recusant to the penalties of high treason. Apparently this Act remained in force till Mary's accession in 1553: one of the first proceedings of her reign was to abolish all statutory treasons not within the statute of Edward III., by which the offence of high treason was and still is defined (1 Mar. st. 1, c. 1). Thus the penalty for not taking the oath of allegiance and supremacy was abrogated, and the oath of course became a dead letter, though not dealt with in express terms. Nor was it revived in the same form when the Reformation again got the upper hand with the accession of Elizabeth. The first Act of Parliament of her reign<sup>1</sup>—which, in repealing the reactionary legislation of Philip and Mary, names “Queen Mary, your Highness' sister,” with a significant absence of honourable additions—created a new and much more concise oath of supremacy and allegiance, to be made by all ecclesiastical officers and ministers, and all temporal officers of the Crown, and also by all persons taking orders or university degrees. It is short enough to be cited in full:—

I, A. B., do utterly testify and declare in my conscience that the Queen's Highness is the only supreme governor of this realm and of all other her Highness dominions and countries, as well

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<sup>1</sup> 1 Eliz. c. 1. In the argument in *Miller v. Salomons*, in the Exchequer (7 Ex. at p. 478), it was erroneously stated to be the first statute on the subject.



in all spiritual or ecclesiastical things or causes as temporal, and that no foreign prince person prelate state or potentate hath or ought to have any jurisdiction power superiority pre-eminence or authority ecclesiastical or spiritual within this realm. and therefore I do utterly renounce and forsake all foreign jurisdictions powers superiorities and authorities and do promise that from henceforth I shall bear faith and true allegiance to the Queen's Highness her heirs and lawful successors and to my power shall assist and defend all jurisdictions pre-eminences privileges and authorities granted or belonging to the Queen's Highness her heirs and successors, or united or annexed to the imperial crown of this realm : So help me God and by [*sic*] the contents of this Book.

The oath was not imposed on all subjects, and the only penalty for refusing it was forfeiture of the office in respect of which it ought to be taken. So far this presents a very favourable contrast to the violent legislation of Henry VIII. Under the Act of Elizabeth the sanction is the mildest one compatible with the law being effectual ; indeed it is not properly a penalty, but a condition. The law no longer says to all sorts of men, "You must take this oath or be punished as a traitor," but only to men receiving office or promotion, "You must take this oath to qualify yourself for holding the place." But troubles were not long in gathering, and they bore their natural fruit in a return to disused severities. A new and more stringent anti-papal Act was passed in 1563 (5 Eliz. c. 1), and it seems that even sharper measures had been at first proposed. The obligation to take the oath of supremacy was extended to all persons taking orders and degrees, schoolmasters, barristers, attorneys, and officers of all courts. A first refusal

to take the oath was to entail the penalties of *premunire*, a second those of high treason. Temporal Peers were specially exempted, "forasmuch as the Queen's Majesty is otherwise sufficiently assured of the faith and loyalty of the temporal lords of her Highness' Court of Parliament." So matters stood till, early in the reign of James I., yet a new outbreak of indignation and panic was produced by the Gunpowder Plot. The Protestant majority was convinced by "that more than barbarous and horrible attempt to have blowen up with gunpowder the King Queen Prince Lords and Commons in the House of Parliament assembled, tending to the utter subversion of the whole State," that Popish recusants and occasionally conforming Papists should be more sharply looked after. Hence the "Act for the better discovering and repressing of Popish Recusants" (3 Jas. I. c. 4), which established, among other precautions, a wordy oath of allegiance, supremacy, and abjuration, which might be tendered by justices of assize or of the peace to any commoner above the age of eighteen; persons refusing it were to incur the penalties of *premunire*. This oath contains an explicit denial of the Pope's authority to depose the King or discharge subjects of their allegiance, a promise to bear allegiance to the Crown notwithstanding any Papal sentence of excommunication or deprivation, and a disclaimer of all equivocation or mental evasion or reservation. About the middle of it occurs for the first time the "damnable doctrine and position" clause, as we may call it, which was long afterwards continued in the interests

of the Protestant succession against James II. and the Pretender. The words are these: "And I do further swear that I do from my heart abhor detest and abjure as impious and heretical this damnable doctrine and position, that princes which be excommunicated or deprived by the Pope may be deposed or murdered by their subjects or any other whosoever." Here also we find the words, afterwards discussed in relation to the admission of Jews to Parliament, "upon the true faith of a Christian." They cannot have been particularly intended to exclude Jews from office, as Jews were at that time excluded from the realm altogether. It has been plausibly conjectured that their real intention was to clinch the proviso against mental reservation or equivocation "by conclusively fixing a sense to that oath which by no evasion or mental reservation should be got rid of without (even in the opinion of the Jesuit doctors themselves) incurring the penalty of mortal sin." For in a certain Treatise on Equivocation, of which a copy corrected in Garnet's handwriting was found in the chamber of Francis Tresham, one of the conspirators named in the Act, and was much used on the trial, this point of mental reservation is fully discussed; and it is laid down that equivocation and reservation may be used without danger to the soul even if they are expressly disclaimed in the form of the oath itself. But there is this exception, that "no person is allowed to equivocate or mentally reserve, without danger, if he does so, of incurring mortal sin, where his doing so brings apparently his true

faith towards God into doubt or dispute." It was probably conceived by the advisers of the Crown that the words, "upon the true faith of a Christian," brought the statutory form of oath within this exception.<sup>1</sup> A few years later, in the session of 1610, a sort of confirming Act was passed (7 James I., c. 6), which made minute provision as to the places where, and the officers by whom, the oath should be administered to various classes of persons.

Shortly after the Restoration an oath declaring it unlawful upon any pretence whatever to take arms against the King was imposed on all soldiers and persons holding military offices (14 Car. II., c. 3, ss. 17, 18); and the Act of Uniformity (14 Car. II., c. 4, s. 6) contained a declaration to the like effect, and also against the Solemn League and Covenant. A similar provision in the Corporation Act was overlooked at the Revolution, and escaped repeal till the reign of George I. In 1672 a revival of anti-Catholic agitation followed upon Charles II.'s attempts to dispense with the existing statutes, nominally in favour of Romanists and Dissenters equally, by a declaration of liberty of conscience. The result was that a declaration against transubstantiation was added to the oaths of allegiance and supremacy by a new penal statute entitled "An Act for preventing dangers which may happen from Popish Recusants" (25 Car. II., c. 2). After the Revolution of 1688, however, a new start was taken. By the combined

<sup>1</sup> Judgment of Baron Alderson in *Miller v. Salomons*, 7 Ex. 536, 537.

effect of two of the earliest Acts of the Convention Parliament (1 Will. & Mar., c. 1 and c. 8), all the previous forms of the oaths of allegiance and supremacy, expressly including the declaration as to taking arms against the King, were abrogated, and a concise form substituted, which stood as follows :—

I, A. B., do sincerely promise and swear that I will be faithful and bear true allegiance to their Majesties King William and Queen Mary. So help me God, etc.<sup>1</sup>

I, A. B., do swear that I do from my heart abhor detest and abjure as impious and heretical that damnable doctrine and position that princes excommunicated or deposed by the Pope or any authority of the see of Rome may be deposed or murdered by their subjects or any other whatsoever.

And I do declare that no foreign prince person prelate states or potentate hath or ought to have any jurisdiction power superiority pre-eminence or authority ecclesiastical or spiritual within this realm. So help me God, etc.

In 1701 came the death of James II. at St. Germain's, and the ostentatious recognition of the Pretender as King of England by Lewis XIV. Fuller and more stringent precautions were again thought needful, and in the very last days of William III.'s life an Act was passed (13 & 14 Wm. III., c. 6), imposing on specified classes of persons, including peers, members of the House of Commons, and all holding office under the Crown, an oath of special and particular abjuration of the Pretender's title. The declaration of 1672 against transubstantiation (which had been spared from the general abrogation of other existing tests at the beginning of the reign) was at the same time expressly continued. As the

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<sup>1</sup> The "etc." means, I suppose, "and the contents of this Book."

form settled by this Act remained substantially unchanged down to our own time, it is here set out:—

I, A. B., do truly and sincerely acknowledge profess testify and declare in my conscience before God and the world that our sovereign lord King William is lawful and rightful king of this realm and of all other his Majesty's dominions and countries thereunto belonging. And I do solemnly and sincerely declare that I do believe in my conscience that the person pretended to be the Prince of Wales during the life of the late King James and since his decease pretending to be and taking upon himself the stile and title of King of England by the name of James the Third hath not any right or title whatsoever to the crown of this realm or any other the dominions thereto belonging. And I do renounce refuse and abjure any allegiance or obedience to him. And I do swear that I will bear faith and true allegiance to his Majesty King William and him will defend to the utmost of my power against all traiterous conspiracies and attempts whatsoever which shall be made against his person crown or dignity. And I will do my best endeavours to disclose and make known to his Majesty and his successors all treasons and traiterous conspiracies which I shall know to be against him or any of them. And I do faithfully promise to the utmost of my power to support, maintain, and defend the limitation and succession of the crown against him the said James and all other persons whatsoever as the same is and stands limited (by an Act intituled an Act declaring the rights and liberties of the subject and settling the succession of the crown) to his Majesty during his Majesties life and after his Majesties decease to the Princess Ann of Denmark and the heirs of her body being Protestants and for default of issue of the said Princess and of his Majesty respectively to the Princess Sophia Electoress and Duchess Dowager of Hanover and the heirs of her body being Protestants. And all these things I do plainly and sincerely acknowledge and swear according to these express words by me spoken and according to the plain and common sense and understanding of the same words, without any equivocation mental evasion or secret reservation whatsoever. And I do make this

recognition acknowledgment abjuration renunciation and promise heartily willingly and truly upon the true faith of a Christian. So help me God.

This oath was in addition to the oaths of allegiance and supremacy prescribed by the Acts already mentioned of the first session of William and Mary's reign, not by way of substitution for them. It will be observed that the words "upon the true faith of a Christian" now reappear. In Queen Anne's reign the only alterations made were first to put Anne's name for William's, and then to leave a blank to be filled in with the name of the sovereign for the time being.<sup>1</sup> The accession of George I. in 1714 gave occasion for a full re-enactment of the oaths of allegiance, supremacy, and abjuration, in what would now be called a Consolidating Act (1 Geo. I., st. 2, c. 13). All persons holding civil or military office, members of foundations at the universities, schoolmasters, "preachers and teachers of separate congregations," and legal practitioners, were required to take the oaths; besides which, they might be tendered by two justices of the peace to any one suspected of disaffection. Members of both Houses of Parliament are, as before, specially forbidden to vote without taking the oaths. The form was settled by inserting the name of George in the blank left by the last statute of Anne, but no provision was made in terms for substituting from time to time the name of the reigning sovereign. In 1766, upon the Pretender's death, the oath of abjuration was

<sup>1</sup> 1 Anne, c. 16, 4 & 5 Anne, c. 20; and as to Scotland, 6 Anne, c. 66 (Statutes of the Realm, c. 14 in other editions).

made appropriate to the new state of things by inserting the words "not any of the descendants of the person who pretended to be Prince of Wales," etc.

In this form the oaths remained for nearly a century, affected only by a certain number of special exemptions. The most important of these was made by the Catholic Emancipation of 1829. The Act which effected this (10 Geo. IV., c. 7) allowed Roman Catholics to sit in Parliament, taking instead of the oaths of allegiance, supremacy, and abjuration, a single modified oath containing the substance of them expressed in a milder form. The Catholic member was required, instead of detesting and abhorring the "damnable doctrine and position," to "renounce, reject, and abjure the opinion" that excommunicated princes might be deposed or murdered; and to disclaim the belief that the Pope of Rome or any other foreign prince had or ought to have any *temporal* or *civil* jurisdiction, etc., within this realm. The words "upon the true faith of a Christian" were for some reason omitted, and the oath concluded thus:—"And I do solemnly, in the presence of God, profess, testify, and declare, that I do make this declaration, and every part thereof, in the plain and ordinary sense of the words of this oath, without any evasion, equivocation, or mental reservation whatsoever." This Act contains, for the first time, a standing direction to substitute in the form of the oath, as may be required, the name of the sovereign for the time being.

All this time the penalties of the statute of 1714



against a member of Parliament who voted without having taken the oaths (or, in the case of a Catholic, the special oath provided by the Catholic Relief Act), continued in force, and very alarming they were. In addition to the pecuniary forfeiture of £500 they included disability to sue in any court, to take a legacy, to hold any office, and to vote at parliamentary elections. Disability to be an executor, which is also in the list, would at this day be regarded by many persons as rather a benefit than otherwise.

The next step was in consequence of the persistent endeavours made through several years to procure the removal of Jewish disabilities. It would be too long to trace the history of this movement through its various stages; and the episode of Mr. Salomons' gallant attempt to take the position by a *coup de main* has now lost its interest for most people except lawyers who have a taste for ingenious argument on the construction and effect of statutes.<sup>1</sup> In 1857 Mr. Salomons, being duly elected for Greenwich, took the oaths on the Old Testament, and omitting the words "upon the true faith of a Christian;" he was sued for the statutory penalty, as having sat without taking the oath; and it was decided (with one dissenting voice, but a weighty one)<sup>2</sup> that these words were a

<sup>1</sup> One of the minor points taken by Mr. Salomons' counsel was that, as the Act of George III. did not authorize the insertion from time to time of the reigning sovereigns' names, it expired at the end of the reign, or at all events when there ceased to be a king named George.

<sup>2</sup> Sir Samuel Martin's, then a Baron of the Exchequer, and now

material part of the oath, and could not be dispensed with otherwise than by legislation. At last, in 1858, a very odd and peculiarly English compromise was arrived at after the House of Lords had repeatedly rejected bills sent up from the Commons. By one Act (21 & 22 Vict. c. 48) a simplified form of oath, but still containing the words "upon the true faith of a Christian" was substituted for the oaths of allegiance, supremacy, and abjuration in all cases where they were required to be taken. The application of this enactment to clerical subscriptions was afterwards more specially regulated by the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122).<sup>1</sup> Then, by a separate Act (21 & 22 Vict. c. 49) either House of Parliament was empowered to permit by resolution "a person professing the Jewish religion, otherwise entitled to sit and vote in such House," to take the oath, with the omission of the words, "and I make this declaration upon the true faith of a Christian." It was also provided that in all other cases where the oath of allegiance was required to be taken by a Jew, these words might be omitted. Such an exemption had once already been given by Parliament in the eighteenth century, but, after the fashion of legislation in those days, only on a special occasion and for a limited purpose; and more recently to the only survivor, as it happens, of the judges before whom the case was argued.

<sup>1</sup> The oaths of allegiance, etc., were enforced on the clergy by Charles II.'s Act of Uniformity and various other statutes. The taking of them was part of the Ordination Service until separated from it by this Act.

enable Jews to hold municipal offices. The Act of 1858, being general in its terms, is a full statutory recognition of the civil equality of Jews with other British subjects, which, though long allowed in practice, had never yet been expressly declared.

At length in 1866 we come out into the daylight of modern systematic legislation. The Parliamentary Oaths Act of that year (29 Vict. c. 19) swept away the former legislation relating to the oaths of members of Parliament, and prescribed the following shortened form :—

I, A. B., do swear that I will be faithful and bear true allegiance to her Majesty Queen Victoria; and I do faithfully promise to maintain and support the succession to the Crown, as the same stands limited and settled by virtue of the Act passed in the reign of King William the Third, intituled “An Act for the further limitation<sup>1</sup> of the Crown, and better securing the rights and liberties of the subject,” and of the subsequent Acts of Union with Scotland and Ireland. So help me God.

For not taking the oaths only the pecuniary penalty of £500 was retained out of the terrible list enacted by earlier statutes. This Act was excellent as far as it went, but it applied only to members of Parliament. It is the fate of English legislation to be carried on as best it can, piecemeal, and at odd times. Measures which excite opposition pass through a struggle in which they are lucky if they escape without maim or grave disfigurement. As to those which

<sup>1</sup> It may be worth while to explain to lay readers that this does not mean limiting the powers of the Crown, but defining the course of the succession.

do not excite opposition, it is for that very reason of no apparent political importance to push them on, and, as it is worth nobody's while to be much interested in them, they have to take their chance. In this case an Act of the following year (The Office and Oath Act, 1867, 30 & 31 Vict. c. 75) authorized the new parliamentary form of oath to be taken in all cases where the oath of allegiance was required as a qualification for office. Finally the Promissory Oaths Act of 1868 (31 & 32 Vict. c. 72) cut down the oath of allegiance in all cases to the form already given at the beginning of this paper, and substituted a declaration for an oath in the great majority of cases where an oath was formerly required. Still the work of simplification was not formally complete. A repealing Act was passed in 1871 (34 & 35 Vict. c. 48), which struck off the statute-book a long list of enactments imposing oaths for various purposes on various persons, and others partially amending or repealing them, from the middle of the fourteenth century downwards. And so the story ends for the present; we no longer stand in fear of Pope or Pretender, and the modern oath of allegiance, devised for the protection of the realm against foemen and conspirators, and swollen with strange imprecations and scoldings, is brought back to the more plain and seemly fashion of the ancient oath of fealty. Yet our ancestors were not capricious in the elaborate safeguards which they built up again and again round a ceremony originally of the simplest. Every clause and almost every word in the statutory oaths of allegiance,

supremacy, and abjuration was directed against a distinct and specific political danger. It is unhappily true that examples of repressive legislation against mere speculative opinions, though less common in England than elsewhere, are by no means wanting. But the political test oaths do not belong to this class. They were framed to discover and bring to punishment, or to disable and exclude from privileges, not the holders of theological opinions as such, but persons holding opinions of which, rightly or wrongly, disloyal and seditious behaviour was supposed to be the necessary or highly probable result. The attempt lately made, and for the present made with success, to use the Parliamentary Oath as a religious test, and thereby exclude a person obnoxious to a majority of the House of Commons, partly for theological, but much more for political and social reasons, has nothing to justify it in English history, or in the traditions of English politics. It is an unhappy example of the ignorance and confusion of mind concerning the institutions of their own country which are still too common among English legislators.

## VIII.

THE HISTORY OF ENGLISH LAW AS A  
BRANCH OF POLITICS.<sup>1</sup>

WE have become accustomed in this country to look upon law as a subject so technical and difficult, not to say repulsive, that nobody but lawyers can well meddle with it. Lawyers, again, are for the practical purposes of their business concerned with the laws as they are, not as they have been. Consequently the history of English law has remained a sealed book to the vast majority of educated Englishmen, and has been studied by a mere handful of scholars. In other words, the greater part of educated Englishmen have not known, and have practically not had the means of knowing, a vital part of the history of their own country. To make my meaning clear on this point, let me remind you for a moment what history is not. Many of us, no doubt, can remember having written out and learnt in our childhood long lists of dates, with what are called events opposite them; accessions and deaths of kings, battles, pestilences, the Gunpowder Plot, the Great Fire of London, and so forth. That is not history; it is only a part of the skeleton of history, and not the most important part.

<sup>1</sup> A lecture delivered before the Sunday Lecture Society.

The signing of Magna Carta, for instance, is one of the events we should expect to find in any table of the leading dates of English history. Well, but the table of dates will not tell us what Magna Carta was; and if you go to the history-books that English school-boys had to learn from till a few years ago, they will not tell you much about it that is worth knowing. What can we learn from the old-fashioned school histories about Magna Carta? Something of this kind: King John ruled very badly, and his barons rose up against him, and made him promise to rule better (only it would be told in much longer words, for people who write school-books seem to think that the smaller a boy is, the bigger words you must cram down his throat); and so they all met at Runnymede, and he signed a charter which has ever since been called the Great Charter; and then there would be some flourish about the birthright of every Englishman's liberties, and trial by jury, and his house being his castle. That is what used to pass for history; it is a little bit more than the bare dates, but a long way from being history still. We want to know how and why the Great Charter was a landmark of English freedom, and why its promise waxed and grew instead of coming to naught. If King John promised to rule better, so have a great many princes before and after him. Look at the present state of Turkey, where the Sultans have been doing nothing but promise to govern better any time this quarter of a century. If charters and promises and good laws written on paper made good government, the Ottoman

Empire would be one of the best governed states in the world. Indeed, our Great Charter is a confused, rambling kind of document to look at, and I dare say the Turkish laws and proclamations are much more elegantly written. So that, before we can say that we have attained real historical knowledge, we must at least begin to see our way to understanding why Magna Carta is a precious and venerable monument of English history, while Turkish charters are waste paper. Now, to understand that, we must understand something of the men who won the Great Charter from King John, and of the institutions they lived under. We must be able to read the Charter not only with our eyes but with our wits, so as to see what it really meant to the people of that time. But now observe that the Great Charter is a legal document. It is full of legal provisions and safeguards, and if we try to make it out without knowing something of the legal institutions of England at the beginning of the thirteenth century, we shall find most of it either unmeaning or misleading. Thus we are plunged into law whether we will or no; there is no help for it if we want to get to the bottom of things, or anywhere near the bottom, but we must go to work and master the legal facts and ideas that statesmen and reformers of the thirteenth century had to deal with. And this is true in a greater or less degree at every stage and period of the growth of our Constitution. Just now I said something about the skeleton or dry bones of history. We may say with more truth and fitness that law is to political institu-



tions as the bones to the body. It is the framework from which institutions take their form; and it is no more possible to be a serious student of history without learning a good deal of law than it is possible to draw the human figure correctly without learning its anatomy. For the same reasons the study of law becomes interesting when one begins to learn its history, and the manner in which its growth is entwined with the growth of English institutions in general. And we find nowadays that our best historians—I will only name one whose right to the first place all competent persons acknowledge, Professor Stubbs—are not frightened by the difficulties of legal history; they grapple fully and fairly with the old records of the law, and, so far from being content to know less about them than we lawyers do, they bring out a great many important things which lawyers either did not know or neglected. It is no business of mine to praise their work as historians: it is but a poor compliment, if it be not an impertinence, for a learner to commend his masters. But as a lawyer I am free to admire the diligence and accuracy of their work on legal ground, and to express my thanks to them for the powerful aid they have given to dispel the fictions and perverse explanations of facts which have too long encumbered our law books. And the fact that they have done this will suffice, I hope, to remove any suspicion you may entertain that I am crying up the study of legal history because I am a lawyer, after the example of the shoemaker who cried “Nothing like leather.”

What I should like to do to-day is to give you some notion of the way in which legal institutions and ideas have been a great and effectual power in politics, so that our political institutions and ideas are not only distinctively English, but have a distinctive colouring of English law. It would, of course, be impossible to do this in any detail, or over any great extent of English history, in the time we have before us. Perhaps the best thing we can do is to take a glance at the legal aspect of English politics at some of the critical periods when our institutions were being most actively made or repaired. Three such periods offer themselves at once: those which are marked by the great constructive work that took place in the twelfth and thirteenth centuries, by the struggle between King and Parliament which led to the Civil War and the Commonwealth, and by the formation of the modern constitution after the abdication of James II. and election of William III. At all three points we shall find well shown, though in somewhat different ways, the part played by law and men imbued with legal ideas in the practical work of English politics. First we take the mediæval period, which at present is the least familiar to educated Englishmen. Practically it was not accessible to any but special students until Professor Stubbs published his great work on our Constitutional History; that was only seven years ago, and besides, it must be allowed that Professor Stubbs is not a popular writer. I fear that the greater part of those who now read his book do it having the fear of an examination

before their eyes. However, the matter of it is fast finding its way into smaller and more popular books ; but for the present we must count it among things not generally known that the latter half of the twelfth and the first half of the thirteenth centuries were in England a time of most vigorous and able constructive work. Almost all our institutions, one may say, were about that time put into a shape still easy to perceive in what they are now. Not that these things were unknown to scholars twenty or thirty years ago, or could not be got at by taking a certain amount of trouble ; but that is just what ordinary readers of history never think of doing. And the proof of this is the fashion in which popular writers used to talk till quite lately—possibly some do it still—about the Middle Ages. If one took them for authorities, one would suppose the Middle Ages were a time of nothing but darkness, dirt, ignorance, and crime, in which nobody knew anything worth knowing, or did anything worth doing. One would imagine mediæval society as divided into wicked lords who lived in castles, poor wretches who were oppressed by them, and hypocritical priests who thought of nothing but making money out of the lay people of all sorts. Anybody who thinks of the past in that way must change his frame of mind before he is even on the road to understand either English history or any other. I am not for a moment going to deny that we are more civilized, infinitely better equipped with the conveniences of life, and on the whole much better and happier than our forefathers

were six or seven centuries ago. A little study of history explodes the fancies of romance-writers about the good old times just as much as the fancy of popular teachers that the old times were good for nothing. But that is in great part because we are reaping at this day the fruit of the work our forefathers did according to their lights. We think it a simple matter of course, for instance, that our lives and property should be safe from open violence; that justice should not be bought and sold; that on the one hand no man should be punished without lawful cause, and on the other hand no private man should be strong enough to defy the law. But suchlike things were not matters of course to the rulers and statesmen of the Middle Ages; they were things to be worked hard for, now and then to be fought for; and if they did their work with a rough hand sometimes, I hardly think it lies in our mouths to blame them, considering what things have been done in our days by the most civilized of governments. And when people say that the Middle Ages invented nothing, I wonder if they think it nothing to have invented Parliament, the pattern of representative government which has been more or less followed by all Western Christendom. But the piece of work I want to call your attention to now is one that came before Parliament. The time was not ripe for Parliaments till there was a fairly settled, strong, and regular system of order and justice. And the needful settlement and strengthening were brought about chiefly by measures which we should now call law reform.

For nearly a century after the Norman Conquest executive government, as we understand it, can hardly be said to have existed in England. The power of the Crown, though nominally much more undefined than in modern times, was less for almost all useful purposes. It was understood to be the right and the duty of the Crown to keep the peace, the king's peace as it was already called.<sup>1</sup> But this did not prevent those who were strong enough from settling their disputes by private war; and down to the end of the twelfth century this appears to have been considered a not unlawful proceeding. Instances of private warfare (apart, of course, from actual civil war waged for political causes affecting the common weal) occur much later. Then there was no general system of administering justice common to the whole country; and this is the point I want you especially to mark.

<sup>1</sup> The technical use of "the king's peace" is, I suspect, connected with the very ancient rule that a breach of the peace in a house must be atoned for in proportion to the householder's rank. If it was in the king's dwelling, the offender's life was in the king's hand. This peculiar sanctity of the king's house was gradually extended to all persons who were about his business, or specially under his protection; but when the Crown undertook to keep the peace everywhere, the king's peace became coincident with the general peace of the kingdom, and his especial protection was deemed to be extended to all peaceable subjects. In substance, the term marks the establishment of the conception of public justice, exercised on behalf of the whole commonwealth, as something apart from and above the right of private vengeance,—a right which the party offended might pursue or not, or accept composition for, as he thought fit. The private blood-feud, it is true, formally and finally disappeared from English jurisprudence only in the present century; but in its legalized historical shape of the wager of battle it was not a native English institution.

In every county and hundred there were ancient popular courts, courts which every free man might be called upon to attend, just as every free man was in theory entitled to be present and have a voice at the great council which before the Conquest wielded supreme power together with the king, the Witenagemót or Witan, that is, meeting of the wise men of the land. When I speak of popular courts, you must not suppose that they were popular in any modern sense. It is doubtful whether the greater number of those who took part in the proceedings had any effectual voice, and it is certain that there was not even an attempt to do speedy and substantial justice. Ancient simplicity is one of the illusions that vanish before historical criticism. The farther we go back in the history of institutions, the more we find people enslaved by formalities, and, indeed, as we should now think, wholly neglecting the substance of affairs for the form. And English history is no exception. All these local courts had their own particular customs; we know that these customs were so many and different that it was thought hopeless to describe them, and there is every reason to believe that they were extremely technical and cumbrous, and abounded in pitfalls quite unconnected with the merits of the case. All ancient procedure is typified in the old Roman story of a man who sued a neighbour for cutting down his vines, and failed because the law of the Twelve Tables spoke only of *trees* in general, and he ought to have followed the very words of the law, and said *trees* instead of *vines*. Similar stories are told of

the old German laws, and no doubt many like things happened in the old English hundred and county courts. There is some evidence, too, that attendance at these courts was found vexatious by the smaller folk, who could ill afford to leave their own affairs for them.

In the same way we used to flatter ourselves that trial by jury was an ancient popular institution; perhaps it may be connected with the name of King Alfred in some books that are still read. It is nothing of the kind. All the details of the story are not made out yet, but it is fairly certain that our modern jury trials arose gradually out of a system of inquiry by sworn commissioners, invented by princes chiefly for the purpose of securing their own revenue, and to evade the formalities and dangers of the old-fashioned popular procedure. The jury, in civil cases at all events, comes not at all from the popular court, but from the king's court. This, however, is too long to enter into now. Let us go on and see what the king's court was. In the larger sense it was the council of great men with whose advice and assistance he acted in affairs of State, the provisional successor of the old English Witan. In a narrower sense, it was this council acting judicially, or a judicial committee of it.<sup>1</sup> Already the notion existed that the Crown had a general judicial supremacy over the kingdom,—the

<sup>1</sup> The phrase has been objected to, but I think over-captiously. Anyhow, I am content to be inaccurate, if inaccuracy there is, in Professor Stubbs's company. Those who wish to be precise beyond question may take the alternative of "sections" suggested by Mr. Freeman. —(*Norman Conquest*, 5, 878).

notion expressed somewhat later by the maxim that the king is the fountain of justice. But the judicial power of the Crown was not exercised by any constant or certain means. Great men in immediate attendance on the court, bishops, and heads of great religious houses,—any one, in short, who was high or strong enough to command the king's attention or rich enough to buy it,—procured their causes to be dealt with in the first instance by the king's court, or removed into it from the local courts; and they obtained, after great expense and delay, an administration of justice which, though it looks rude enough to us, was probably much in advance of the proceedings of the local courts. Much complaint is now made of the cost of litigation, and not altogether unjustly; but in the twelfth century it was something enormous. The king's justice was one great source of his revenue, and he sold it very dear. Observe that this buying and selling was not in itself corruption, though it is hard to believe that corruption did not get mixed up with it. Suitors paid heavily not to have causes decided in their favour in the king's court, but to have them heard there at all. The king's justice was not a matter of right, but of exceptional favour; and this was especially the case when he undertook, as he sometimes did, to review and overrule the actual decisions of the local courts, or even reverse, on better information, his own previous commands. And not only was the king's writ sold, but it was sold at arbitrary and varying prices, the only explanation of which appears to be that in every case the king's officers took



as much as they could get.<sup>1</sup> Now we are in a position to understand that famous clause of the Great Charter : “To no man will we sell, nor to none deny or delay, right or justice.” The Great Charter comes about half a century after the time of which we have been speaking ; so in that time, you see, the great advance had been made of regarding the king’s justice as a matter not of favour but of right. And besides this clause there is another which provides for the regular sending of the king’s judges into the counties. Thus we may date from Magna Carta the regular administration of a uniform system of law throughout England. What is more, we may almost say that Magna Carta gave England a capital. For the king’s court had till then no fixed seat ; it would be now at Oxford, now at Westminster, now at Winchester, sometimes at places which by this time are quite obscure. But the Charter provided that causes between subject and subject which had to be tried by the king’s judges should be tried not where the king’s court happened to be, but in some certain place ; and so the principal seat of the courts of justice, and ultimately the political capital of the realm, became established at Westminster.

Of course these things were neither done all at once nor took their full effect all at once. The king’s justices, for instance, had made rounds of the country

<sup>1</sup> Bigelow, *History of Procedure in England*, 153. I am not so confident as Mr. Bigelow that executive writs of this kind were ever really issued without some judicial consideration ; but for the present purpose this is not material.

long before the Great Charter, and Henry II. had reduced this to something like a system ; but this was in the first instance chiefly for the purposes of the king's revenue. The king's court was the instrument of collecting his dues as well as of doing his justice. The sheriff, whose place was in those days anything but a merely ornamental one, was answerable to the Exchequer for the revenue of his county ; but the justices and barons of the king's court went round from time to time to readjust valuations, hear complaints, and control the local authority. Gradually they drew to themselves, as representing the king, the administration of justice as well as of revenue matters ; and at length in Magna Carta we have justices who are sent out for purely judicial purposes, though still with a limited jurisdiction. The powers of our present judges of assize were gradually added at different times. But to this day the judges of assize are received with the honours due to the Queen's representatives, and as such take precedence of every one in the county.<sup>1</sup> Thus the local courts were little by little superseded (though in the City of London and several other cities and towns ancient local courts, more or less modified for the convenience of modern times, have gone on down to our own day), and one

<sup>1</sup> The technical reason of this, according to the late Mr. Justice Willes, whose wide and exact knowledge of English legal history has probably never been surpassed, is that, whereas the sheriff has a writ of assistance directed to all archbishops, bishops, etc., the judges of assize have a like writ directed to the sheriff himself. See on the whole matter of the origin and dignity of their court his judgment in *Ex parte Fernandez*, 10 Common Bench Reports, N.S., pp. 42-56.

and the same law was regularly administered in the king's name. The immediate effect, no doubt, was to increase the power of the Crown at the expense of local potentates and jurisdictions. It was what we now call a centralizing measure. But another effect was to make the profession of the law a distinct, powerful, and dignified one, having a good deal of independence even as against the Crown; and the constitutional results of this were most important when the time came, nearly five centuries later, for the great contest between the King and the Commons. Nor must we forget the effect the circuits of the king's judges, and the pleaders who then as now followed the court from place to place, must have had in uniting the people of England in the possession of a common stock of legal and political ideas. The institution of the jury presents a remarkable parallel to this. Devised at first, like the missions of the travelling judges, for the convenience of the Crown in securing its own rights, we see it become an instrument of doing justice between subject and subject, and at length a safeguard for the subject against the power of the Crown.

Now mark in all this the ceaseless action and reaction of law and politics on one another. We begin with arrangements which we should now call political rather than legal, made for the better or more profitable conduct of government. You must remember that the distinction of professions and departments was nothing like so sharp as it is now; things were, so to speak, all shaken up together,

and gradually being settled and shaped into their places; and so institutions could be transformed and put to fresh uses much more easily than we can do it nowadays. Then these devices expand into fixed legal institutions, which in some measure we have preserved to this day. Then the legal institutions acquire a kind of independent existence, and afford in turn a rallying-point and leverage for politics. Not only there is the idea of law being supreme even over the king, but the law is something visible and embodied; it has its proper organs and can make itself heard, if need be, at a political crisis. When I speak of the law being supreme, I mean that this was fully and clearly realized by our mediæval writers. Let me tell you what was said about this by Bracton, a few years after the middle of the thirteenth century. Bracton wrote a great systematic treatise on English law, the first of its kind, and this is what he says in one place of the king: "Now the king hath one set over him, that is, God. Likewise the law, whereby he is made king. Likewise his own court, to wit his barons and earls; for earls are called *comites*, as being the king's companions, and who hath a companion hath a master. So if the king be without bridle, that is, without law, they must put the bridle upon him;"<sup>1</sup> and then Bracton goes on to say that, in case the king and the barons should all be unrighteous together,

<sup>1</sup> This passage was cited, but not fairly or relevantly, on the first and last occasion where Charles I. had the law clearly on his side: see 4 St. Tr., 1009. There would be something grotesque, if the matter were less grave, in vouching Bracton to warrant the jurisdiction of the High Court of Justice to try the king for treason.

justice will be done upon them in the next world, if not in this. And in another place he speaks thus : “ The king ought not to be under any man, but under God and under the law, because the law makes him king. Therefore let the king render to the law what the law renders to him, that is, dominion and power, for he is no king if his will rules and not the law.” In yet another place this is repeated in almost the same terms. There you have in a nutshell, laid down by an English lawyer of the thirteenth century, the great point of English constitutional freedom, that law is not merely the instrument of government, but the safeguard of each individual citizen’s public rights and liberties. It is sad to think that nevertheless there were English kings long afterwards who found lawyers and judges willing to give them opinions of quite another sort.<sup>1</sup> Still they thought it needful to have these opinions on their side. Even in the days when the liberties of Englishmen seemed most nearly forgotten, acts of tyranny had to be fortified with at least a show of legality. There is one great safeguard in particular which has always held its own. In this country no officer of the State, however high his office, can exceed or abuse his lawful authority without being liable to be sued in the ordinary courts of justice like any other wrongdoer. So much are we accustomed to this right that we hardly look on it as a privilege. Of course it will not do everything. In bad times it could not prevent servile Parliaments

<sup>1</sup> One may well guess that the reprinting of Bracton in 1640 was not unconnected with the political circumstances of the time.

from creating oppressive authorities with oppressive powers, nor could it protect the suitor against packed juries or obsequious judges. But if we look abroad for a moment, we shall see that in many other countries, I think we may say in all or nearly all Continental countries, no such right of the subject exists at this day. Acts done by executive officers of the State in the course of their functions are subject to the control of the executive government only, and removed from the jurisdiction of ordinary courts. If we try to conceive what Englishmen would think of living under such a law, we shall not find it hard to appreciate the value of our own. A curious illustration of the English rule is afforded by an authority repeatedly cited in the arguments on the great case of Habeas Corpus under Charles I. Edward IV. was informed by one of his judges that the king can in no case arrest a subject in person, for this reason, that if the arrest should not be justified, the subject would lose his lawful remedy of an action of false imprisonment, as the king cannot be personally sued.

This point I have just mentioned exhibits in a striking way a character of great political importance for which the English race is eminent—I mean the quality called law-abidingness. We and our kinsfolk in America love to think ourselves a law-abiding people. We like to have the sanction, or at least the analogy, of precedent and law for whatever we do. This, be it marked, is a very different thing from the habit of submission to persons in authority; our respect is for the law, not for the persons. Now this

habit of mind appears in the earliest history of English law. The appeal to precedent which is the foundation of our modern jurisprudence is evident in records of a date soon after the Conquest. And I cannot help thinking that the circumstances of the Conquest had something to do with the way in which this idea took root in English law and government. William the Conqueror won his English crown by hard fighting, as we all know; but he did not claim it merely by the right of the stronger: he maintained that he was the rightful king of the English, and Harold was a usurper. His case was wrong according to the English constitution of that time, because Harold had been duly chosen for king by the people and the Witan, and William had not. Still the claim had in more than one way a fair colour of right about it, and William made a great point of coming in by law and not barely by force.<sup>1</sup> There were great confiscations of the lands of Englishmen who resisted, but otherwise English laws and customs were observed as they had been under the English kings, or as nearly as might be. Thus Norman rulers had to administer a system with which they were not familiar, and there must naturally have been a great deal of local inquiry, searching for precedents, and ascertaining usages from the people on the spot who knew most about it. In fact we see much of the process in the great land survey known as the Domesday Book. And the

<sup>1</sup> The evidence is worked out in detail by Mr. Freeman in the two last volumes of his *History of the Norman Conquest*, especially the chapter on Domesday, and the notes thereto.

natural effect of this, again, would be to make the importance of precedent and established custom more sharply and strongly felt. We know that in British India, where English judges and magistrates have been set to work to administer Hindú and Mussulman systems of law, the result has been to give to the native laws a certainty and fixity, and even an activity and binding force, which they had not before. It is true that English lawyers brought their notion of judicial precedents and the like to India all ready made; and native Indian laws and usages are immensely more unlike ours than English institutions were unlike Norman ones. Yet I think the analogy is sufficient to be not worthless; and I will venture to say, as at least an allowable guess, that some such effect was also produced in England under the time of Anglo-Norman rule which followed the Conquest. This feeling of the sanctity of precedent has had something to do with the formalism and pedantry that have been the plague of English law, and are not quite got rid of yet. But we must never forget that it has likewise been a most powerful weapon in the hands of champions of English freedom. Its power is shown by the efforts that were made to escape it. When English sovereigns were reproached with unauthorized and unexampled acts of despotism, they taxed all the ingenuity of their servants to find in the records of past reigns anything that looked like example or authority. So here again, if I am right, we see the political circumstances of the country forming or strengthening a certain habit of mind in legal matters,



and this again becoming a national temper which plays a great part in politics. The difference between fighting for the ancient rights of one's fathers and for a claim to some new right which nobody quite understands is like the difference between having a wall at your back and standing in open ground.

Before we leave the Middle Ages there is another matter of legal and historical importance to say one word about. In the time we have been speaking of there was a keen rivalry between the secular and the ecclesiastical courts. To this day every bishop has his court, but the jurisdiction is practically confined to the clergy, and even so things of real importance are seldom concluded there. But in the twelfth century, and for centuries after, it was far otherwise. The spiritual courts exercised a kind of general supervision over manners and morals, and interfered with private life in almost every detail. Besides this, they struggled hard for jurisdiction over almost everything that seemed nearly or remotely connected with ecclesiastical discipline or interests. For example, they claimed the exclusive right of dealing with all causes relating to marriage, and that with considerable success. The history is an extremely curious one, but at this time I can only call attention to one aspect of it. The spiritual courts had, no doubt, their good side; they could give relief in many cases where, owing to the limited number of legal causes of action which were then admitted, it could not be had in the king's courts. But the meddlesomeness and petty tyranny that could be, and frequently were,

exercised through them were such as a modern reader can hardly believe; and when one has learnt something of this, it becomes much easier to understand why the Reformation was so much of a political success in England, and why the people looked on with so much equanimity at the wholesale dissolution of religious houses (many of which had ecclesiastical courts attached to them) and confiscation of Church property.

Now I must ask you to pass over four centuries, and come to the great fight which the Commons of England fought against the Stuart dynasty for the better part of a century. I say the Stuart dynasty with a distinct meaning. The contest which ended with the downfall and exile of the last Stuart king was fully and deliberately begun by the first, as I shall immediately show you by one of its earliest records. It is a long and momentous chapter of English history, but at present we are concerned with only one aspect of it, the extent to which the contest was waged on legal ground and with legal arguments. Down to the very outbreak of the Civil War the dispute between the Crown and its advisers on the one side and Parliament on the other had a distinctly forensic turn. In his most high-flying claims the king always professed to be maintaining no more than the just and ancient powers of his predecessors, and was never at a loss for more or less plausible arguments to that effect. In their most stubborn resistance the Commons never, until actual hostilities were imminent, quitted the firm ground of established

rights and liberties. The great points in issue were two: whether the Crown could levy taxes and impositions, on any occasions or under any name, without the consent of Parliament; and whether the king in Council had a discretionary power of imprisoning men, and keeping them imprisoned, without assigning any cause beyond his own special command. A third question, and one connected with very weighty practical grievances, though in the later stages of the conflict it rather fell into the background, arose upon the assumption of the Crown to make by proclamation without the authority of Parliament a variety of rules and ordinances, amounting to petty legislation, in almost every department of administrative government, and in some matters we now think beyond the province of government altogether. All through the time, covering something more than a generation, between the first encroachments of James and the final breach of Charles with the Parliament, these things were argued as questions not of policy but of existing law. There was, of course, a strong sense and purpose of policy underneath the legal contentions of both parties; but both parties were anxious above all things to get the law on their own side. I will now read to you the very words in which the Commons brought their grievances before James I. as early as 1610, in the matter of impositions and proclamations. And let me just note in passing that if you want to form a lively conception of any period of history, and enter into the thoughts and feelings of the men you are reading about, there

is only one sure way that I know of; and that is to get hold, as far as you can, of records and documents of the time itself, and not be content with what other people tell you about them. It seems troublesome at first, but it saves more trouble in the end; and as regards English history at any rate it is an infinitely easier thing to do than it was fifty or even twenty years ago.

This is what the Commons said to James I. in 1610 about impositions levied without consent of Parliament<sup>1</sup>:—

The policy and constitution of this your kingdom appropriates unto the kings of this realm, with the assent of the Parliament, as well the sovereign power of making laws as that of taxing or imposing upon the subject's goods or merchandizes, wherein they have justly such a propriety, as may not without their consent be altered or changed.

This is the cause that the people of this kingdom, as they ever showed themselves faithful and loving to their kings, and ready to aid them in all their just occasions with voluntary contributions; so have they been ever careful to preserve their own liberties and rights, when anything hath been done to prejudice or impeach the same.

And, therefore, when their princes, occasioned either by their wars or their over great bounty, or by any other necessity, have, without consent of Parliament, set impositions either within the land or upon commodities either exported or imported by the merchants, they have in open Parliament complained of it, in that it was done without their consents, and thereupon never failed to obtain a speedy and full redress, without any claim made by the kings of any power or prerogative in that point. And though the law of propriety be originally and carefully preserved by the common laws of the realm, which are as ancient as the kingdom itself; yet these famous kings, for the

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<sup>1</sup> 2 *State Trials*, 519.

better contentment and assurance of their loving subjects, agreed that this old fundamental right should be farther declared and established by Act of Parliament: wherein it is provided that no such charges should ever be laid upon the people without their common consent, as may appear by sundry records of former times.

We, therefore, your Majesty's most humble Commons, assembled in Parliament, following the example of this worthy care of our ancestors, and out of a duty to those for whom we serve, finding that your Majesty, without advice or consent of Parliament, hath lately in time of peace set both greater impositions and far more in number than any your noble ancestors did ever in time of war, have with all humility presumed to present this most just and necessary petition unto your Majesty, that all impositions set without the assent of Parliament may be quite abolished and taken away.

You see how carefully and pointedly the right is claimed as a matter of established law. Then comes the complaint against arbitrary proclamations, which is if possible yet more distinct in this respect:—

Amongst many other points of happiness and freedom which your Majesty's subjects of this kingdom have enjoyed under your royal progenitors, kings and queens of this realm, there is none which they have accounted more dear and precious than this, to be guided and governed by certain rule of law, which giveth both to the head and members that which of right belongeth to them, and not by any uncertain or arbitrary form of government. . . . Out of this root hath grown the indubitable right of the people of this kingdom not to be made subject to any punishment that shall extend to their lives, lands, bodies, or goods, other than such as are ordained by the common laws of this land, or the statutes made by their common consent in Parliament.

This prelude marked out with sufficient clearness the lines to be taken by the great struggle, when Charles I. endeavoured to carry through the policy

he had inherited from his father. Seventeen years after this petition of grievances was addressed to James, Charles raised money by a forced loan. There was a widespread feeling in the country that the whole thing was against law, and many gentlemen of good standing and substance wholly refused to contribute. "I was called," one of them said afterwards, "before the Lords of the Council, for what I know not. I heard it was for not lending on a Privy Seal. I told them, if they will take my estate, let them—I will give it up; lend I will not." In the end several of the recusants were committed to prison. Five of these reclaimed their liberty, and sought the aid of the courts to be enlarged. As it was impossible to charge them with any specific offence known to the law, the question was whether they could be imprisoned by the mere executive authority of the king and the Privy Council. Hence arose a memorable discussion of the subject's right to personal liberty, first before the judges of the King's Bench, and afterwards in Parliament. In court the result was inconclusive; the judges would neither go directly against the king nor commit themselves to giving a decision completely in his favour. But the matter was taken up in the House of Commons, and that with quite as elaborate and technical an apparatus of learning as had been brought before the judges. If lawyers on the bench were timid or servile then, and were still more servile a few years later, there were lawyers enough in Parliament, and learned ones too, who could use their knowledge in the cause of freedom. Both James and

Charles spoke in terms of bitter complaint of their opposition. And their task was a harder one than it seems at first sight to a reader of the present day, not only as regards the boldness it required, but as regards the apparent merits of the argument. Modern research has on the whole amply borne out the Whig view of the controversy, if we may so call it by anticipation. The claims of the Commons were not only justified by policy and the common weal, but well warranted on the purely historical grounds which were assigned for them. Yet the case for the Crown was not hopeless. The terms and the spirit of Magna Carta, the repeated confirmation of it all through the Middle Ages, and in general the weight of early authority, were doubtless on the side of the Parliament. But recent practice was no less on the side of the king; and on questions of constitutional law the practice of nearly a century is a formidable thing to deal with. The Tudor sovereigns had frequently, if not constantly, done things as high-handed and as difficult to justify by law as anything Charles I. had yet attempted. The difference was that their government, on the whole, had been popular, and they knew where to stop. If in their time money was raised irregularly, it was for genuine public purposes. If men were imprisoned arbitrarily, it was not for defending the rights of the whole commonalty. If commands of doubtful legality were issued, it was in matters of real emergency. Henry VIII. and Elizabeth would certainly have repudiated the position of a modern constitutional monarch. But they sought

to lead their parliaments and people, not to force them; they never committed the fatal mistake of raising money by unparliamentary means on purpose to make themselves independent of Parliament. Thus the substantial answer to the precedents of the sixteenth century—a good answer, I think, both in law and in policy—was that, if the Tudors were allowed to carry things with a high hand, it was by an acquiescence confined to the particular times and occasions, not by the allowance which makes a binding custom. In our own time we have seen how executive authority may be strained to the verge of legality by a popular and powerful minister, with success for the time being, if not altogether with subsequent impunity. This remark is not made in the interest of one political party more than another, for it applies equally to Mr. Gladstone and to Lord Beaconsfield. If, however, a lesser man than these should ever attempt to follow the precedent of bringing Indian troops to Malta, or the abolition of purchase in the army by royal warrant after a Bill for the same purpose had failed to pass through Parliament, he might find himself seriously mistaken. And in somewhat the same fashion, only on a greater and more fatal scale, Charles I. found himself mistaken when he tried to wield the sceptre of the Tudors.

The rights of the Crown and of the subject were argued in the House of Commons, as I said, by members who were among the first lawyers of the day—such men as John Selden and Sir Edward Coke. And after this argument the House passed the fol-



lowing resolutions on the pressing question of personal freedom :<sup>1</sup>—

1. That no free man ought to be detained or kept in prison, or otherwise restrained by the command of the King or Privy Council, or any other, unless some cause of the commitment, detainer, or restraint be expressed, for which by law he ought to be committed, detained, or restrained.

2. That the writ of Habeas Corpus may not be denied, but ought to be granted to every man that is committed or detained in prison, or otherwise restrained, though it be by command of the King, the Privy Council, or any other, he praying the same.

3. That if a free man be committed or detained in prison, or otherwise restrained by the command of the King, the Privy Council, or any other, no cause of such commitment, detainer, or restraint being expressed, for which by law he ought to be committed, detained, or restrained, and the same be returned upon an Habeas Corpus granted for the said party, then he ought to be delivered or bailed.

That is expressed almost in the form of a legal opinion, most carefully and strictly worded—a very different sort of thing from rhetorical declarations of supposed natural rights of man. Against the levying of taxes without the consent of Parliament the protests already made were yet more strongly and concisely renewed. The resolution on this head ran thus—

That it is the ancient and indubitable right of every free man, that he hath a full and absolute property in his goods and estate; that no tax, tallage, loan, benevolence, or other like charge, ought to be commanded or levied by the King or any of his Ministers without common consent by Act of Parliament.

Two months after this the Petition of Right was sent up to the king, and after another month had

<sup>1</sup> 3 *State Trials*, 82. The date is March 29, 1628.

been occupied by attempts on his part to put off the Parliament with an evasive answer, it received his assent in due form. This great instrument of English liberties is too long to quote; not that it is very long in itself, but that every clause would need a commentary. It is a recital of grievances committed against established laws, and ends with the prayer of the Lords and Commons that they may be removed, "All which they most humbly pray of your most excellent Majesty as their rights and liberties according to the laws and statutes of this realm." But it was many years before the Petition of Right was allowed to take any substantial effect; indeed, sixty years were to pass before its work was fully done and its harvest reaped—the harvest of just and settled liberties for the people of England, of exile and ignominy for the Stuarts. After giving his assent to the Petition, Charles dissolved the Parliament in indignation, and for eleven years ruled without summoning another; and the claim to levy taxes by the sole power of the Crown was revived in a new form in ship-money. In the great case between the Crown and Hampden we find as boldly advanced as ever the argument already used in the revenue cases of the former reign, that the king has two sorts of power—his ordinary prerogative, which is known to the law and defined by it; and an absolute or sovereign power, which is above the common law, and even above Acts of Parliament. From the use of such an argument to the open defiance of law may seem to us at this day to be but a step; but it was a step that

Charles dared not or would not take. He was still as anxious to be despotic by law as the Commons were to withstand him by law. The bench had been brought, by judicious dismissals and promotions, to be pretty well of one mind with the king and his counsellors, and a majority of the judges pronounced for the Crown against Hampden. One of the first acts of the Long Parliament was not merely to protest against Charles's proceedings in the matter of ship-money, but to declare this judgment void and bad in law. Here, we may say, is about the last point at which the legal character of the battle between King and Parliament is maintained. The Grand Remonstrance, presented by the Parliament in 1641, is distinctly a political manifesto. It covers, no doubt, all the ground covered by the Petition of Right, besides a great deal more; but it is impossible to turn from the Petition of Right to the Remonstrance without feeling that one has passed from a distinctly legal to a distinctly political atmosphere. It is worth remark that the one act which more than any other made the Civil War inevitable, the king's attempted arrest of the five members early in the following year, was also the first act on his part which was manifestly and flagrantly illegal. It was unlawful, one may say, in every possible way. I am not aware that any sort of legal justification or excuse for it has ever been so much as attempted. In fact, Charles I.'s earlier proceedings were endeavours to wrest the Constitution, then still more or less pliable, to his own sense; his aim in the matter of the five

members was an undisguised *coup d'état*, and if it had succeeded he had made every preparation to pose as the saviour of society.

We said that it took sixty years for the Petition of Right to come to its full effect. The lapse of those sixty years brings us to the flight of James II. from the country whose freedom he had neither the strength to crush nor the prudence to propitiate with even a decent show of respect. Once more, and happily for the last time, an English Parliament counted up against an English king the tale of wrongs inflicted and promises broken. The same Bill of Rights which declared the abdication of the government by James II. and the acceptance of the throne by William and Mary set forth point by point the offences of James against the liberties of the nation, and point by point declared his acts illegal. In this the Lords and Commons explicitly professed to be doing as their ancestors in like case had usually done, and to claim and insist upon all the heads of grievance "as their undoubted rights and liberties." Here a question suggests itself, which may have occurred to you already when we spoke of the Petition of Right, and which we may usefully stop awhile to consider. The Bill of Rights, the Petition of Right, the Great Charter itself, all purport to do no more than make a solemn affirmation of rights already allowed. In every case the existing title of the subject to these rights was claimed, as I believe, in perfect good faith (though it does not follow that to some extent it might not be opposed in good faith also), and the claim was well made out. Yet

historians tell us, and there is no doubt of the fact, that every one of these instruments is a landmark in the history of the Constitution. Since the Revolution, in particular, government has been altogether on a new footing. How can these facts be reconciled? How can political institutions be developed and transformed by putting on record existing legal rights? From a merely legal or a merely political point of view it seems a puzzle. The answer is to be sought in the interaction of politics and law which I have endeavoured to keep in view throughout this lecture. In legal theory the binding force of all laws is the same. The lawyer, as such, knows nothing of the political reasons which dictated them, the practical effects of their application, or the readiness or otherwise of the persons concerned to obey them. But their operation is in fact modified in infinite degrees by all manner of social and political conditions. There are laws that wake and laws that slumber, laws that are strictly followed, laws that are evaded, and laws that are quietly neglected. The very same written law will take quite a different complexion by change of times, persons, and administration. Every school has its own comment on the text. The judges who were James II.'s instruments could not meddle with the Petition of Right in its actual terms, but they sent peaceful citizens and honourable women to execution on trifling or infamous evidence of imaginary treasons. Though far more despicable and servile than any of their predecessors under Charles or the first James, they could not repeat their performances

in the matters of impositions and ship-money; but they discovered that the king had a supreme dispensing power which enabled him to undo for all practical purposes the work of the Reformation. The Bill of Rights was the declaration of a people whose long-suffering was exhausted that these things and such as these should no longer be. It was an exercise of political power to ensure that the legal securities for freedom and good government should be fully, fairly, and actively maintained in force. It was the determination of England that the laws which guarded the liberties of Englishmen should thenceforth wake and not sleep. To a great extent they had slept under the Tudors; they might have slept for generations more if Elizabeth had been succeeded by a ruler of men instead of a perverse pedant; even after the Commonwealth they might have again fallen into lethargy if Charles II. had learnt any lesson of statesmanship from his misfortunes, or James II. had been possessed of common prudence. Happily for the nation the accumulated follies of the Stuarts made this impossible. The Bill of Rights takes up the interrupted note of the Petition of Right, and is the last word of a nation who had trusted and had been deceived till they could trust no more. Legally there is nothing new, or hardly anything; politically there is the difference between taking a man's word and taking security.

But when we say that legally there is nothing new, this must not be understood in too large a sense. When you define a rule that existed in a less definite

shape before, you cannot help adding something to it. Do what you will to make your statement a faithful interpretation and nothing more, still it is an interpretation, and thenceforth you have the new interpretation besides the old text, if text there was. Moreover, the interpretation is hardly ever the only possible one; it may be clearly the best, but the case must be exceptionally clear if no other can make anything like a fair show. A choice which was held more or less in suspense is fastened upon one reading or one shade of meaning in preference to another. The right or usage itself may be as ancient as you please, but the new statement gives it a new fixity and force. Such a process is carried on every day by courts of justice in deciding disputed points of law. Their object is to ascertain what the legal rule is, not to add to it or alter it; but they cannot declare the rule without putting something more into it, and fixing, as it were, a new starting-point. Most of our law has been gradually built up in this fashion; and Acts of Parliament, so far from superseding this operation, make it more necessary than ever, since even the most carefully framed piece of legislation is sure to leave some room for doubt as to its application to the facts of particular cases. The Bill of Rights and the Petition of Right may be regarded as parliamentary definitions or interpretations of the more ancient instruments and customs on which the liberties of England were acknowledged to rest. This is the more easily conceived when we reflect how much of the modern working of our Constitution depends on understandings which have

never been defined by any positive authority. The Sovereign is still perfectly entitled, so far as positive law is concerned, to refuse assent to Bills sent up by the estates of the realm. No such body as the Cabinet, and no such person as a Prime Minister, is in any way known to the law. There are Privy Councillors, and there is a First Lord of the Treasury; the Cabinet is a wholly informal committee of the Privy Council, and the First Lord of the Treasury is in an equally informal manner its chief. When Lord Beaconsfield described himself in the Treaty of Berlin as First Minister of England, it was remarked as a thing without precedent even in diplomatic documents. Our positive constitutional law takes no notice of the existence of parties or their leaders. It is a legal principle that the Crown can act only through Ministers who are responsible to Parliament; but the manner in which those Ministers are chosen, which is an extremely important part of the practical machinery of government, is outside legal definition and beyond legal control. There is not even any positive rule that Ministers who are not peers must have seats in the House of Commons. One might go on by the hour putting examples of things which would probably or certainly be unconstitutional in the sense of running counter to some of the understandings on which government is carried on, but which certainly would not be illegal. With this system of understandings the Constitution has worked smoothly for nearly half a century, and so long as it goes on working smoothly there will be no need for further definition. It is



conceivable, however, that the necessity for it might somehow arise. In such a case it might happen that the Cabinet, like other committees of the Privy Council which began in an informal way, like the superior courts of justice themselves, should come to acquire a legal existence. A similar process, though not quite the same, is being exemplified before our eyes in the House of Commons. The positive rules of debate are so framed as to leave an immense latitude to members and give immense opportunities for delay. They were framed, and long acted upon, on the assumption that members of the House of Commons would behave themselves as reasonable men and gentlemen, and would not obstruct public business for obstruction's sake. But in the last three or four years certain ingenious members have invented the policy of obstruction for the set purpose of bringing the whole proceedings of Parliament to a dead-lock, and thus intimidating the House into compliance with their demands. What is the result of this? After all the House is master of its own rules, and will not allow them to be notoriously abused. The understanding founded on trust having broken down, positive regulation becomes needful. One or two partial remedies have already been tried, and other and more stringent measures are in prospect.

Thus far we have been considering the political aspect of actual laws and legal institutions. But legal ideas of a more abstract kind have also made their mark on politics, and a greater one than might be

expected. One instance must suffice to illustrate this, but it shall be a striking one. We have just been speaking of the Revolution and the Bill of Rights. It may seem hardly serious to say that a considerable number of those who, after being more or less troubled with legal and other scruples, determined that their allegiance was no longer due to James II., were mightily fortified in their resolution by a legal fiction. Yet such is the plain fact. The Convention Parliament declared that James had "endeavoured to subvert the Constitution of the kingdom by breaking the original contract between king and people." This original contract, called by later writers the Social Contract, was nothing else than a supposed compact on which society and government were founded. It is hardly needful to state that such a compact is purely fictitious. It is a putting of the cart before the horse. There can be no contract until there are laws and government; and this theory seeks to explain the force of law by founding it on a prior contract. Men living in a state of individual independence are supposed to come together and agree to form a society, whereas we now know that individual rights and independence become possible only when society has reached a fairly advanced stage. It is the fallacy of carrying back modern legal notions to times and circumstances where the facts to which they are applicable do not exist. But it would be out of place here to discuss the doctrine of the Social Contract at any length, and the more so as it has been excellently treated by Mr. Leslie Stephen in his *History of Eng-*

*lish Thought in the Eighteenth Century.* The curious point I wish to call your attention to is that this theory, being distinctly the offspring of speculative minds under the influence of legal training, was eagerly seized upon for the service of practical politics by our statesmen of the Revolution.<sup>1</sup> The express engagements of the coronation oath might seem at first sight to give a better reason for declaring James in default. This, however, was suggested only to be put aside, ostensibly on the technical ground that the king is as much king, and therefore as much entitled to the subject's allegiance, and bound in turn to govern according to law, before he is crowned as after.<sup>2</sup> No doubt it was felt that a broader position must be taken as against the doctrine of absolute divine right. It may now seem to us incomprehensible that rational men should adopt or act upon such a doctrine, but at the time it had a real power, and troubled the consciences of many good men who were no friends of tyranny. To combat it with effect a counter theory was necessary, the time and the men not being ripe for a frank appeal to public utility. The happy fiction of the social contract was ready to hand, and smoothed over the difficulty. But though it deserves to be called happy to that extent, it is a

<sup>1</sup> Hooker, whose authority Locke is glad to put forward on his side, appears to be the first considerable English author in whom the idea is found. It occurs in the Parliamentary debates of 1628, and in the trial of Charles I. There, however, the coronation oath is as much or more insisted upon.

<sup>2</sup> Lord Clarendon's speech, 5 *Parl. Hist.* 76.

still happier thing that the original contract, though it was prominent in the declaration of the two Houses, somehow did not find its way into the Bill of Rights. Had it been embodied in the Act which established the Protestant succession, it might have become for English citizens at large what it really was for a time to the Whig party, a political article of faith.

In the fragmentary view I have given you of some of the leading epochs in English politics, I have tried to make it plain to what an extent the forms of legal institutions, conceptions and claims of strictly legal right, and even the fictions of legal speculation, have entered into the very bones and marrow of the history of our country. We have at the same time, perhaps, obtained a glimpse of a much wider truth which also has its political significance, namely, that law and the machinery of law, like all other human institutions, grow and cannot be made to order. And if I have succeeded in bringing it home to any one of you that in the light of these ideas the critical and historical study of the laws of England is far from being the dry and crabbed business which most Englishmen still suppose it to be, I shall count my pains well rewarded.

## IX.

## THE SCIENCE OF CASE-LAW.

## I.

MUCH has been said and written lately about making English law more scientific in various ways: as to the form by processes of definition and consolidation, as to the substance by getting rid of archaisms and anomalies. And, besides those who do or suggest good work of this kind, there are those who expound a so-called science of law which on examination appears to have little to do with science, and less with the law of England. But not much attention has been paid to the scientific character of the methods by which a great part of English law has actually been built up, and by which it is still administered and developed. We mean that part which is made not by enactments but by decisions, and which is to be sought in the records of decided cases. It once bore the unhappily chosen name of unwritten law: modern writers call it after its source by the more convenient and accurate name of case-law. This system of case-law might be described in hostile popular language as a servile following of precedents tempered or supplemented by transparent fictions—a

sort of hand-to-mouth scrambling work at best. It is true that the results are ill-arranged and difficult to get at. The state of English case-law as a whole might be not unfairly described as chaos tempered by Fisher's Digest. Hence it is assumed by a not unnatural fallacy that there must have been something bungling and unscientific in the operations by which the results themselves were produced. What we now seek is to show that these operations have a truly scientific character, and that English case-law may fairly claim kindred with the inductive sciences.

The ultimate object of natural science is to predict events—to say with approximate accuracy what will happen under given conditions. Every special department of science occupies itself with predicting events of a particular kind. Note also that each science occupies itself only with those conditions which are material for its own purposes. The object of legal science, as we here understand it, is likewise to predict events. The particular kind of events it seeks to predict are the decisions of courts of justice. Like the other sciences, it selects its own sets of conditions to deal with. Let us consider for a moment an event which has both physical and legal consequences. If A strikes B, then the effect of the blow on B's equilibrium is a matter of mechanics; the effect on his organism is a matter of physiology; the effect of giving him a right of action is a matter of law. For the scientific examination of the event in each of these several aspects we want to know and to deal with the several appropriate sets of conditions, and those only :

thus if B struck A first, this is irrelevant to the mechanical question, but relevant to the legal question. The legal result is as definite and capable of prediction as either the mechanical or the physiological one; the needful thing in each case is that the right set of conditions be rightly observed. So far, then, natural science and legal science aim at like objects. Let us go on to consider the likeness of the means by which those objects are accomplished.

In natural science we need an all-embracing fundamental assumption before we can take any step towards prediction; in other words, before we can have any science at all. This assumption is that nature is uniform. We act on the belief that whenever the same conditions are repeated they will give the same result, and we refuse to entertain any supposition to the contrary. How we came by this axiom of the uniformity of nature, or whether it can be justified otherwise than by its results, we have not now to ask: all we need remark is its place as the corner-stone of science. It is plain that without it we could make no use whatever of past experience.

Turning now to legal science, we find that an assumption of the same kind is no less needed. In order to predict physical results, we must suppose that the same thing always happens under the same conditions; and in the same way, in order to predict legal results, we must suppose that the same decision is always given on the same facts. We must have a fundamental axiom of the uniformity of law corresponding to the fundamental axiom of

the uniformity of nature. But here a notable distinction at once strikes us. We cannot make nature uniform; we can only gradually discover that as a matter of fact we succeed or fail in our undertakings just in so far as we remember or forget to act consistently on the assumption that nature is uniform. But law is made by man, and man can do as he pleases with it. Here it is in our power to make our fundamental axiom approximately true; we say approximately, but of this afterwards; for the present we neglect the approximate character of legal as well as of physical prediction. The object is to ensure the same decision being given on the same facts. In English case-law this object is attained by what seem the most obvious and direct means, namely, an understanding that the court shall follow the authority of decisions formerly given on similar facts.

Now if there were but one court, or branch of a court, administering the same system of law and bound by its own decisions, that would be adequate to produce in course of time a consistent body of case-law which could be used as materials for scientific prediction; but, as a matter of fact, we have several co-ordinate courts, and we have to prevent them from making different and inconsistent bodies of law. Here, again, we have chosen, or rather evolved, the most direct of various possible ways that might be thought of. We have a court of appeal whose decisions are binding on the courts of first instance, and a court of last resort whose decisions are binding on all other courts and on itself. This last principle, that the



decisions of an ultimate court of appeal are binding on itself, is seen from our present point of view to be indispensable in order to keep up the fundamental assumption of uniformity. Apart from this consideration, it might seem anomalous ; and it was not formally enounced — perhaps we might even say not followed in practice—by the House of Lords till within quite modern times. It is also seen to be necessary that there should be only one court of last resort for the same system of law. Without discussing the exact nature of the authority of the Judicial Committee of the Privy Council as bearing on the general system of English case-law, it may be said that this condition has hitherto been not perfectly satisfied, as we have had one ultimate Court of Appeal for points of English law arising at home and another for points of the same law arising in colonies where English law prevails. It is further to be observed that from the scientific point of view it is desirable that appeals should not be left altogether to the option of the parties. As it is, there is no security against lawyers being perplexed for years together (as they frequently are) to reconcile or choose between the conflicting decisions of co-ordinate courts. The best thing (speaking always in the interests of pure science) would be that suitors should be moved by pure zeal for the advancement of legal science to make a point of carrying such cases to an ultimate appeal ; but this they naturally are not. The next best thing would be a compulsory appeal ; but this is obviously impracticable. To some extent it might be possible to get

such cases heard by the Court of Appeal sitting as a court of first instance as regards the particular case, but in effect on appeal from the authority called in question ; but for various reasons—such as the difficulty of foreseeing at any early stage on what point a case will ultimately turn—this would be only a partial remedy. As another alternative, it might be made somebody's business to call the attention of the Court of Appeal to difficulties of this kind from time to time, and to submit cases to it for the purpose of obtaining judicial opinions, which should be of the same authority as the actual judgments of the court. Such matters would, of course, have to wait till the court could deal with them after the actual appeals of suitors ; and at present we have no legal officer who could be expected to undertake the task of selecting and preparing the cases. Some such proposal may become practicable when (if ever) we have a Ministry of Justice, Legal Department, or what else it may be called. Yet another way of removing such doubts is direct legislation. Except by rare luck, this way must be the clumsiest and least satisfactory, at least with our present fashion of legislating ; and as regards the order of things we are now considering, it is not a natural operation at all, but a catastrophic interference. To prevent misunderstanding, I may say that such interference is desirable, not to say urgently called for, in more than one branch of English law. The difficulty is that such business, having nothing to do with party politics, does not interest Parliament ; and it seems almost hopeless with our present parliamentary system either

to get a hearing for any scheme of codification, or if it does get a hearing, to secure its being competently and adequately worked out. The Criminal Code exists as a finished draft, but its enactment seems as far off as ever.

The system of judicial precedents, themselves kept uniform by a supreme court of appeal, being thus chosen as the means of keeping up the assumption of uniformity, the system of reports follows as an indispensable auxiliary. As the man of science has to predict what will happen under new conditions from what is known to have happened under more or less similar conditions, so the man of law must predict the decision of a new case from what is known to have been decided in more or less similar cases. In order to do this, they must both have at hand the recorded results of former experience. For the lawyer those results are to be found in the reports. There is yet another parallel. A vast number of scientific observations are made for practical purposes which add nothing to our powers of prediction, but simply confirm what is known already. In law, too, a vast number of cases are decided which settle the rights of the parties, but add nothing to the general body of law, and these cases are not or ought not to be reported.<sup>1</sup> Like the repeated experiments and regular observations of science, they answer their own practical ends, and also give the expert that sort of familiarity

<sup>1</sup> My own opinion, in which I believe I am not singular, is that the bulk of our current series of authorized Law Reports is at least double what it ought to be. Much stricter control ought to be exercised both by the general editor and by the judges.

with the principles and methods of his art which cannot be attained except by constant handling of the sort of particular examples on which the general principles are based. Again, the hundredth or thousandth observation which (as we say) illustrates a scientific truth is, of course, in itself as good as the first observation which (as we say) established it. In the same way unreported cases are in theory no less binding on the court than reported ones. But here the difference also comes in. The science of case-law being wholly conventional, we might, if we chose, absolutely limit the field of observation to reported cases, as it now is practically limited with trifling exceptions, or even to the authorized Law Reports, without any loss to the scientific character of our work. Whether it would be in fact a good thing to forbid the citation of any but the authorized reports is a minor question of convenience, not to be discussed here.

It must not be forgotten that our English system of precedents and reported cases is by no means the only one by which a system of case-law might be constructed. For instance, it might happen, from the want of permanent trained judges or for other reasons, that the opinions of eminent lawyers should have more weight with the judges themselves and with their profession generally than any decisions actually given. In such a state of things there might grow up a body of reported opinions instead of reported judgments, and this would produce a system of case-law scientific to a considerable extent, though the danger of internal conflict would be much increased

by the want of a final appeal, and the actual administration of the law would correspond less closely to its ideal scientific aspect than on our plan. Something like this did happen at Rome.<sup>1</sup> A system of case-law grew and flourished there which was founded not on decisions but on opinions. And for such reasons as above given it became in course of time so unmanageable that the violent remedies of legislation had to be called in, first to set up a kind of parallel to courts of appeal by enacting that the opinions of certain writers should be preferred, and then to give a definite and exclusive authority to a select compilation from the whole mass. This compilation we still have in the Digest, which is a kind of petrified case-law. The great difference from our own case-law is that the elements of which it is composed are not the judicial decisions of real cases, but the opinions of advocates and text-writers on cases either real or supposed. We should add that the Code gives us something more analogous to our own case-law, containing as it does not only the legislative acts of emperors, but their decisions in a judicial capacity. To this day the interpretation of the Codes in the Continental States which have codified their law, and of the modern Roman law in those which have not done so, depends on a mixture of decisions and opinions in which the opinions of the leading writers have, if anything, the greater weight.

<sup>1</sup> Something like it is also happening now, I believe, in the United States; at any rate, authorities are criticized there with a freedom which seems to an English lawyer to imply a growing sense that after all it is a matter of opinion, and nothing more.

## II.

We have now seen that case-law has a scientific aim, namely, the prediction of events by means of past experience, and that the possibility of such prediction rests, as in other sciences, on a fundamental assumption of uniformity. We have seen also that in the science of law this assumption is a conventional one—that is to say, one which it is in our own power to make approximately true, and how that purpose is served by some of the most characteristic parts of our legal system. Let us now continue the parallel between the method of case-law and scientific method in general.

Consider what the man of science does when he comes to deal with a new set of facts. He has before him a complex phenomenon. The first thing is to form a clear conception of the facts, and to select those which are material for the kind of result he wants to predict. Next, he makes a provisional guess (subject to correction, if need be, at a later stage), at the kind of uniformity likely to be found in the particular case, and he considers what is known of this kind of uniformity. He consults the records of actual experience and of the consolidated results of experience (namely, established scientific truths expressed in a general form). If he finds the work done to his hand in the shape of consolidated results it is well; if not, he proceeds to collect and compare such instances as are most like the one before him, noting the special points of likeness and difference; and from the results which

have been known to happen under these various sets of conditions he finally draws an inference as to the result which may be expected under the conditions now before him. Moreover, if in the course of his inquiries he finds any particular observation inconsistent with some uniformity that is already well established by observation and verified by fulfilled prediction, he concludes without hesitation that the observation was wrongly made or wrongly recorded.

Let us turn now to the lawyer who advises on a new case. We shall find that our description of the process followed by the man of science really includes the description of the process followed by the lawyer. For we can get a description of the lawyer's method by substituting the special terms of his art for the general terms we used in the last paragraph: conversely, we can get a general account of what the man of science does by generalizing our statement of what the lawyer does. His first step is to get a clear conception of the facts of the case; such facts, that is, as are likely to be material to the legal result. (In practice the sifting of the facts is not all done by one hand, but this we may neglect.) He will then guess provisionally to what department of law the case belongs. The rightness of the guess may at this stage be a matter for any degree of belief between perfect certainty and extreme doubt, according to the complexity of the facts. He will then know whereabouts to look, either in a text-book or in his memory, for the law which seems to be applicable. In one or other of these stores of knowledge, or partly in the

one and partly in the other, he will find some general proposition, together with a reference to one or more reported cases on which it is founded. It may happen that this general proposition is one of those which are so well established that it is thought needless to discuss the original authorities for them, and it may also happen that being of this nature it is obviously applicable to the case in hand. When this is so the lawyer will seek no farther. But if the rule is either not perfectly settled and familiar, or not obviously applicable, then if he is a sound lawyer he will attend as little as possible to the form in which the general proposition is expressed, but will proceed to study the particular cases from which it is collected, examining their points of likeness and unlikeness to the case before him. He considers the legal results of the various sets of facts already decided upon in the reported cases, making various provisional hypotheses if need be, and correcting them as he goes along, and finally he draws an inference as to the probable legal effect of the facts he is desired to advise upon, and expresses that inference in his opinion. At this final stage, again, the state of his mind may, according to the nature of the case, be anything from extreme confidence to extreme doubt; moreover, if he finds a great many cases tending to a certain uniformity of result—or, in technical language, a “current of authority”—and one or two stray cases of not more than co-ordinate authority which give an opposite result, he dismisses those stray cases from his consideration as having been wrongly decided. He does not let



them modify the conclusion derived from the rest, but strikes them out of account altogether: in technical language, he says they are not law.

It will be seen that the success of these operations depends on the manner in which the work of selection and comparison is performed in each case. The inquirer must first discern rightly which are the material conditions of the question, and then he must assign the question to its proper class; in other words, he must select the right kind of cases for comparison with the case before him. And, lastly, he must observe the right points of likeness and unlikeness in the cases he compares. Failure in any one of these things may lead him to a wrong conclusion. The faculty of doing them rightly is not to be acquired by rule (at least, by any rule yet known), but only by familiar handling of the subject-matter of each particular science. Experts acquire an unconscious habit of looking at the matters of their own art in the right way, which may almost be called an instinct. Great general powers of reasoning and observation will make it easier for a man to learn a new science, but will not qualify him to deal with particular questions of a science he has not learned. If he attempts this he is almost sure to go wrong. On the other hand, experts are often tempted to extend their special way of looking at things to matters that are in truth altogether outside their art; and when they do so they are likewise almost sure to go wrong. Both these dangers are exemplified in a very striking and instructive manner by the mistakes of both laymen

and lawyers with regard to legal science. For instance, there has been no more fruitful source of erroneous political and social theories than the application of systematic legal conceptions to states of things in which those conceptions are foreign or, in the strict sense, preposterous. The figment of a social contract is the standing example of this kind of mistake.

Hitherto we have, for the sake of clearness, considered only the work of the consulting lawyer who predicts legal consequences which he cannot directly control. If the case ever comes before a court for decision, it is the business of the court to determine what those consequences shall actually be. But this determination has to be not arbitrary, but regulated in such a manner as to keep up the fundamental assumption of uniformity, and to make scientific prediction possible. We have already said that this is ensured by an understanding that the judgment of the court shall be guided by authority. Let us now examine the meaning of this a little more closely. For our present purpose it means that the court itself assumes the position of a scientific inquirer, and goes through a process which is the same in kind as the advising counsel's. It is true that the court deals with materials already put into shape by counsel, and the scientific value of their work is recognized by the form of speech in which judges are wont to acknowledge the "assistance given to the court" by an able argument. But this is only assistance: the court may, and sometimes does, seek out authorities which had been

overlooked, or take a view of the whole case which had not occurred to the advocates on either side. The court, then, following on the whole the same process as the advising counsel, makes a scientific prediction with reference to an ideal standard. The reasons given for the judgment of the court express the grounds on which this prediction was made, and the judgment itself (unless reversed on appeal) ensures the prediction coming true. It might seem at first sight simpler to avoid the mention of an ideal standard by saying that the judgment of an inferior court is a prediction of what would be decided by the court of last resort. But this would not be correct, inasmuch as the court of last resort itself pursues the scientific method, and not only holds itself bound by its own decisions, but is guided by an ideal standard of scientific fitness and harmony. This is rather a matter of fact than a matter of theory or even of convention, and is the natural result of the judges having been long trained in legal habits of mind. The ideal standard is, in fact, nothing else than the objective side of the legal habit of mind itself, when considered as independent of the particular individuals in whom the habit is formed. It cannot be found in any one book or in any one lawyer, but only in the collective opinion of legal experts. Now the decisions of the courts do gradually and within certain limits react on the ideal standard, and may in course of time modify it considerably. However, in modern times the tendency has been to narrow these limits: that is to say, courts are nowadays disposed to enforce an

antiquated or inconvenient rule as it were under protest, rather than invent exceptions until the rule is "well nigh eaten up" with them, or get rid of it by such other devices as are well known to readers of law reports. But here we touch on the ground of the historical relations of case-law and legislation, which Sir Henry Maine has made his own. On the whole, the effect of the mutual reaction of professional opinion and decided cases is to prevent the ideal conceptions and the actual results from ever becoming inconveniently remote from one another. Now the fiction of a perfect and uniform system of law which is gradually discovered by the judges has been the subject of much criticism and some contempt. But it is in truth only a strong and somewhat crude way of representing this same ideal standard of case-law, which is, indeed, slowly modified from time to time, but may be taken as nearly constant for the time over which the search for authorities practically extends. This time varies in different branches of law, but on the average we may roughly call it three generations or thereabouts. It would be easy to find examples from natural science to show that an uniformity which is known to be relative and approximate may nevertheless be of great practical worth; thus in dealing with terrestrial gravity we neglect, among other small matters, the diminution of a body's weight as the distance from the earth increases. That is, we work with an assumed rule which we know not to be exactly true, but which we find near enough to the truth for the purpose in hand. But it may serve

better to take an instance from another quarter. Statistics give us a number of averages which are known to depend on varying conditions, and those, too, within human control to some extent. Such are birth and death rates, annual averages of crime, illegibly addressed or unaddressed letters, and the like. But although we know more or less what most of the conditions are, and even in what directions they are varying at a given time, the empirical uniformities represented by the averages remain so far constant over moderately short periods that for the purposes of predicting events within such periods they are more trustworthy than our present imperfect knowledge of the conditions.

### III.

At the point we have now reached it may be objected that the comparison of case-law with natural science breaks down, inasmuch as the legal order of things has only a relative and limited uniformity, whereas the order of nature has an absolute uniformity. The short answer to this is that we do not know the order of nature to be absolutely uniform.<sup>1</sup> We only know that the departures, if any, from the assumed uniformity are not discoverable by any means of observation we now have. The difference between a uniformity not known to be absolute and a uniformity known not to

<sup>1</sup> Even if the uniformity of nature is accepted as a necessity of thought, our empirical knowledge of any particular law of nature still cannot be absolute. The distinction is acutely discussed by Mr. Shadworth Hodgson in his *Philosophy of Reflection*.

be absolute is a difference of degree ; we can only say that the correspondence is much more close in the one case than in the other. Another and really more important difference has already been pointed out at the beginning. In case-law the fundamental assumption is conventional. It is expedient for purposes of general policy that law should be uniform and legal decisions capable of prediction, and one chief aim of our judicial system is to make them so. But then the conventional character of our fundamental assumption does not affect the scientific character of the subsequent steps. We may find something not unlike this in science, if not in what is called natural science. The whole system of symbolical algebra rests on a conventional assumption. In arithmetical algebra we find that certain operations with symbols give certain results, expressed in like symbols, when the symbols have certain definite and limited meanings. In symbolical algebra we assume that the same operations will have the same results when the meaning of the symbols is extended beyond the limits that originally determined the form of the operations ; and we assign such a new meaning to the operation as will make that assumption true. In arithmetical algebra we get the rules of operation from the known meaning of the symbols ; in symbolical algebra we find new meanings for the symbols to fit the assumed universality of the rules ; in other words, we assume a conventional uniformity of results. This is not offered as having any close analogy to the conventional uniformity of case-law ; but analogies of a certain remoteness may be not

the least suggestive. Moreover, we must add that the more refined sort of legal uniformity which is connected in the manner explained above with the existence of an ideal standard, and for which we lack a word equivalent to the Roman *elegantia*, cannot be deemed merely conventional in so far as it springs from unconsciously formed legal habits of mind.

Another difficulty seems to arise, not upon the nature of the general uniformity, but upon the approximate and uncertain character of particular predictions in case-law. Now this uncertainty, so far as it is peculiar to legal science, depends partly on the imperfection of our arrangements for realizing the ideal standard, partly on external disturbing conditions. On the one hand, the want of a complete and homogeneous system of appeals leaves room (as we have already said) for conflicts and inconsistencies; on the other hand, judges and lawyers are human, and their legal judgment is sometimes influenced by unscientific motives. But, after allowing for these and such like errors, the general answer to the objection is that our comparison is not the worse but the better for the confessedly approximate character of legal predictions. For no general proposition of science is known to be more than approximately true, nor is any prediction known to be more than approximately accurate. In the sciences called exact the approximation is very close indeed; in the still rudimentary science of politics it is exceedingly rough; in the science of case-law it is much rougher than in the exact sciences, but much closer than in politics. Perhaps we may

even say that the methods of any science are not the less but the more scientific in proportion as they recognize the approximate character of all scientific assertion, and avoid the appearance of ascribing to general propositions a value different in kind from that of the particulars which they sum up. In case-law these scientific marks are prominent. Except in the simplest cases, lawyers are most careful to make their inductions from particulars to particulars, to beware of general propositions and to express their opinions in a more or less qualified form. Legal maxims afford a good instance of the true character of general propositions in law. They are for the most part mere symbols, which are useful to the lawyer as a kind of technical shorthand, suggesting definite groups of legal facts, but which are only misleading if they are supposed to mean anything else. One often sees legal maxims hopelessly misapplied by people who, not understanding their real value, make them the starting-point of deduction for purposes quite foreign to their true scope. Of course we meet with certain uniformities in this as in other sciences, which are so extensive and of such long standing that they have been consolidated into a kind of minor fundamental assumptions. Yet it is significant that even these are seldom to be found enunciated in a dogmatic form. One might read through a good many volumes of reports without finding it anywhere laid down in so many words that it is an offence to steal, or that men ought to perform their contracts. Even when judges or counsel profess to deduce their opinions from pro-



positions expressed in general terms, they really think not so much of the general proposition as of the decided cases by which they suppose it to be justified, so that the rightness of the actual result does not depend on the form in which the general proposition is expressed. Lawyers fully recognize that it is unsafe to rely on a general statement of law, however solemnly adopted by the court, which is "not necessary to the decision." In other words, they admit the inductive method alone as valid. Here, also, we see that this is one way in which we may get a right decision on wrong grounds: a correct induction may disguise itself, perhaps even unconsciously, in the shape of an incorrect deduction. We believe that men of science may readily find parallels to all these processes in their own departments.

Let us now see if we cannot find a scientific parallel even to the besetting fault of English case-law. The fault it has been most constantly charged with is its technicality. This complaint is made partly with and partly without reason. It is unreasonable to this extent, that no science can well exist without a certain amount of technicality. For every science has its own peculiar ideas, which must be expressed either by peculiar words or by common words used in a peculiar sense, and it is not reasonable when people complain that these strange words and meanings of words are not intelligible to a person who has not learned them. It is advisable for many reasons that the legal use of language should be not very widely removed from the popular use, but the two can never be made one

unless we will have the law much less accurate or can make men's common speech much more accurate. Exactly the same complaints are made by the ignorant, and sometimes by those who ought to know better, of the special language of every branch of science. But the complaint may be reasonable in another way. The technical terms of every language are convenient symbols, but their very convenience is dangerous, and the facility given by them is always in danger of abuse. When one is operating with symbols it is often a good thing to forget what the symbols mean during the process, but one must always be prepared to remember it at the end. Now a fixed habit of operating with a certain number of symbols is apt to induce one to forget this very thing, the result of which is that the operator becomes the slave of his symbols instead of their master, and thinks he is thinking when he is only playing with counters. In short, scientific forms of speech are liable to get worn out till people can talk fluently in a technical language which does not express any real thought. It is a slight evil, if evil at all, when experts speak a language others do not understand, but it is a serious evil when they speak a language they do not understand themselves. This is the besetting disease of scientific vocabularies, and the only remedy is to recast and simplify them from time to time. The terms must be defined afresh, or new ones must be made as need requires. Something of this kind is now doing for mathematics and mathematical physics. In our case-law there has been a good deal of this kind of diseased

technicality. The test of sound technical language is that it is capable of being put into sensible English, and there is no denying that a good deal of English case-law has been made at one time and another which cannot be put into sensible English. In the common law this state of things has been, on the whole, effectually remedied by the Common Law Procedure Acts, and by the determination of the judges in recent years to discourage all mere trifling with words. The technical language of equity jurisprudence still leaves much to be desired in this respect. There are too many words and phrases which have a sort of mystical value attached to them, and which do not sufficiently correspond to any definite ideas: but in this department also there are considerable signs of improvement. It seems reasonable to hope that the better acquaintance of common law and equity may make it needful for the followers of the two systems to be at more pains than heretofore to be understood by each other, and that, inasmuch as the shortest way of doing this will be to speak plain English as much as possible, we shall thereby find ourselves helped towards the further end of keeping English law reasonable, intelligible, and consistent—in one word, truly scientific.

We have purposely forbore to complicate the discussion by trying to make statute law fit into our comparison. Acts of Parliament might at first sight be likened to catastrophic events which cannot be predicted; but it is easily seen that this would be a hasty and imperfect simile. For their actual operation is not to produce catastrophic results, but to

introduce new sets of conditions which must be taken into account in future predictions. Moreover, a good part even of our existing statute-law may be regarded as consolidated case-law. This consolidation, commonly treated as one of the minor functions of legislation, is in truth one of its highest. On a large scale it is codification. And, inasmuch as I found when this essay was first published that some of its expressions were liable to be perverted by enemies of codification to uses they were never meant for, it may not be amiss to say now that I am a strong believer in codification, and have given my reasons for it in some detail elsewhere.

## X.

## THE CASUISTRY OF COMMON SENSE

## 1.

IN the foregoing essay we have endeavoured to show that the practical branch of legal knowledge which is concerned with the decision of new cases has all the characters of inductive science, and proceeds on the scientific method. We traced certain analogies between the leading assumptions made by men of science and by men of law, the objects and conduct of their inquiries, and the nature of the results which those inquiries bring out. Starting from the ground thus gained, we will now try the further experiment of adventuring in the same direction on a field where our ways must be more dark and precarious, inasmuch as the subject is altogether in a less settled and scientific condition. The proposed topic of our consideration is the practical aspect of Ethics as an inductive science, or, as perhaps it is better to say, an art working by the method of inductive science. It should be scarcely needful to premise that the parallel between law and morality is already to a certain extent familiar. It is implied in the use of such common phrases as "the moral law," "the verdict of conscience." It has been more or less dwelt upon by writers on jurisprudence, but from the legal

point of view and for the purpose of marking differences rather than developing resemblances. They are naturally concerned with it only so far as it helps them to explain what Positive Law is not. Little use, if any, has been made of the parallel to the end of throwing light on the solution or arrangement of the problems of ethics.

Taking legal science in its widest extent, we find that it has different branches aiming at distinct objects. The first great division is between the theory of legislation on the one hand, and on the other hand jurisprudence, including the theory of positive law, and what is called legal learning in a special sense. The theory of legislation deals with the matter of law, and shows us how we may know what laws are the best in themselves, or to be desired by reasonable men; in shorter terms—which, however, we cannot well use for our present purpose, on account of the ambiguity of the principal word—what ought to be the law. We might make the names more uniform by calling this Final Jurisprudence, by analogy to Final Cause, a philosophical term which, though perhaps not very convenient, is generally understood. Jurisprudence proper deals in the first instance with the form of law, and shows us the general characters of existing laws and legal institutions, which is the theory of positive law, and by means of this theory conducts us to the scientific handling of the matter of law for practical purposes, making us the better able to understand or expound in an accurate and orderly manner what the law actually is; and this is the learning of lawyers in the

special sense. This learning again has two divisions or aspects. In its theoretical aspect it especially belongs to teachers and students, and considers any system of law, such as the laws of England, as a body of rules existing at a given time and place. This may be grouped together with the theory of positive law by the name of Statical Jurisprudence. In its practical aspect it belongs to the work of the lawyer, as an adviser and advocate, and shows us how we may predict with varying degrees of probability the judicial decision of particular new cases as they arise. This is the theory of case-law, which we might call Dynamical Jurisprudence. And it is to be observed that all these branches are in some measure independent of one another. A statesman may have very just notions of legislation with little technical knowledge of law, while a great lawyer's notions of legislation may be exceedingly narrow and perverse. Again, a man may be a master of jurisprudence in its general or historical aspects, while his opinion on a particular case would be less trustworthy than that of a counsel skilled in case-law, or the special department of it under which the case falls; and at the same time the legal conceptions and knowledge of this last counsellor in matters outside his own special experience may perhaps be very crude and defective. The wider knowledge is nevertheless to be sought, if possible, in every case, and if other conditions are equal, the man who has most of it is likely to do best even in his own department.

Now we say that the like divisions have place in

the doctrine and practice of ethics. To the theory of legislation there corresponds that part of ethical philosophy which considers what moral ordinances or standards are the best in themselves, and which has in itself nothing to do with the particular moral rules which may be current at a given time and place. To jurisprudence and its applications there correspond the science and art of ethics, in so far as they deal with actually existing standards of morality. As there is or may be a theory of positive law, so there is or may be a theory of positive morality giving a scientific account of the general elements and characters universally present in ethical feelings and motives, which Mr. Grote in his *Fragments on Ethical Subjects* has happily called the Form of Ethics. The theory will naturally go on to give after the same manner a classified account of the leading heads or institutions of ethics, as jurisprudence does with regard to law; to borrow a term which has no precise equivalent in English, it treats of *Sitten-Instituten* as the science of law treats of *Rechts-Instituten*. There are certain general topics and conceptions common to all civilized systems of law, such as Status, Domicil, Contract; and under each head we find sets of rules in the several systems which have a certain family likeness, however much the corresponding rules of different systems may conflict with one another in the detail of their contents. So there are general heads of conduct common to the morality of all civilized nations, and forming as it were an ethical *ius gentium*; and an adequate and connected analysis of these would



form a scientific treatise on Positive Morality. This again would enable us, as in the analogous case of law, to put into a scientific form our knowledge of any particular moral system. By a moral system we mean all the rules of conduct which as a matter of fact are enforced at any given time on the members of an existing community by the sanction of common opinion. Moreover, we find, as before, the twofold aspect of knowledge as theoretical and practical, or as science and art. On the one side it deals with moral rules and institutions as an existing body of facts which may be known; on the other side, it has to deal with new problems in conduct as they arise—that is, to decide questions as to the moral duty of an individual in particular circumstances. This last branch of ethics corresponds in its scope and method to case-law, and we shall call it by the name of Casuistry, not seeing why a useful word should be condemned to disuse by reason of having acquired invidious associations, and being herein emboldened by the example of the late Professor Maurice, though not using the word altogether as he used it. We mean by this word, we repeat, simply that art, which we all have to exercise more or less, of applying ethical knowledge to the solution of new ethical problems in practice. We may further make, if we please, a division of ethics into Final, Statical, and Dynamical, corresponding to our division of jurisprudence. It is not without importance to note that here, nearly or quite as much as in law, we find the knowledge and skill proper to these departments to

be in a manner independent of one another. A man may be blameless and even punctilious in his life according to the moral standard of the society he lives in, but quite incapable of seeing that the standard itself is faulty. This is especially the case with such rules as may be called moral customs rather than moral laws, being observed only by particular sections of a community. In the last century, for example, the so-called laws of honour which made illegal homicide a social duty in certain events were often obeyed by those whom they affected with far more zeal and less reflection than most of the precepts of common morality. Again, a man's competence to decide on a particular case of conscience is by no means necessarily in proportion to his scientific knowledge of ethics. There are many persons whose judgment on the morality of a proposed course of conduct one might almost implicitly trust, but who know nothing whatever of moral philosophy. This is, indeed, very much more conspicuous in opinions on moral questions than in the analogous case of opinions on legal questions. For it is too notorious to dwell upon that while the theory of ethics is as yet even sought only by a few, the practice is widely spread, and the certainty that we have but a handful of moral philosophers, and for some time to come cannot look to have any great number, does not make us fear a dearth of good citizens. And the reasons of this are strong and manifest; for the formal handling of ethics is infinitely more difficult than that of law, wherefore the theoretical judgment is more scarce; and, on the

other hand, no citizen can grow up to man's estate without becoming in some degree an expert in casuistry as we have above defined it, wherefore the practical judgment is more abundant.

If we look at the manner in which ethical subjects have hitherto been discussed, we shall find that the parallel still holds. A good deal of attention has been paid to Final Ethics, or the problem of finding an ultimate test of the worth of results, and some, though not so much, to Statical Ethics, or the task of giving an account of existing results; but very little to Dynamical Ethics—that is, the process by which new results are in practice obtained, and the existing body of results as it is found at any given time has been largely built up. We said in the former discussion that the object of the science of case-law, as of natural science, is to predict events; the class of events this science seeks to predict being the decisions of courts of justice. Every legal opinion given on a new case aims at foretelling an expected or imagined decision. May we say that in like manner it is the object of casuistry to predict events, and that when we form an opinion on the moral duty which will arise in a given state of circumstances we are foretelling a decision? It appears to us that we may, though not without further search and explanation. We have to compare somewhat more closely the assumptions on which the legal and the moral judgment proceed, not forgetting to take note of differences as well as resemblances; and in doing so we may perhaps at the same time get some insight into the specific character of the ethical

process, and its gradual operation on the standard of Positive Morality.

## II.

The predictions of natural science rest on the assumption that nature is uniform, or that whatever is known to happen here and now under certain conditions will happen again under the like conditions at all times and places within the range of man's experience. The predictions of that part of legal science which is called Case-law rest on the assumption that within the range of the particular system of law the same legal judgment will be passed by every competent court upon the same facts. Here the assumption is conventional—it depends, that is, upon a settled understanding that courts of justice are to be bound by former decisions. It further presupposes an expectation that this understanding will in fact be observed, which expectation is not conventional, but depends on our belief in wider uniformities of human conduct in general. Why such an understanding is desirable is one of the questions belonging to that other branch of legal science which is called the Theory of Legislation.

Let us now see what is implied in our moral judgment of any particular case. It is obvious that we assume some kind of uniformity, for otherwise there could be no considered judgment at all, but only passing impressions of like or dislike. Moreover, this uniformity is not to be sought only in the single mind that forms the judgment, but in an external standard. When I call an action right, I

mean that it excites in me a feeling which similar actions have excited in the past and will excite in the future. But I mean also something more—namely, that I judge not merely as an individual expressing my personal feeling as to things which concern my own good or harm, but as a citizen expressing a fellow-feeling as to things which concern the good or harm of my fellow-citizens. I assert a claim to their sympathy and support in the view I take of the matter, on grounds quite apart from any particular interest they may take in me. In simple cases, which are the vast majority of the whole number that occur in practice, my expectation of their support is confident; I have no doubt that whenever this or a like action is brought to their notice, they will feel about it as I do. In less simple cases I may have doubts, possibly grave doubts; but still I think on the whole that I am saying what the community would say. There are also more complex cases where my own judgment stands not for the decision likely to be given by my neighbours as they are, but for a decision imagined as likely to be given by my neighbours if they were such as I wish them to be; but we are not yet ready to deal with this. We may say, then, that the moral judgment is, or at least includes, the prediction of like judgments in like future cases, founded on an assumption of uniformity. In legal judgments this assumption is, as we have just said, in the first instance conventional, but ultimately empirical. But here it is wholly empirical, inasmuch as by the nature of the case no convention is possible,

the absence of the organized discipline by which conventions are carried out being the very mark of positive morality as distinguished from positive law. There is not and cannot be any explicit understanding that society as a whole shall be bound by precedents and decide on fixed principles. Nevertheless, it is observed as a matter of fact—and we wish to state it simply as a fact, and quite apart from any grounds of social history or psychology by which it may be accounted for—that the moral judgment of an average right-minded man does, on the whole, follow precedents, and is guided by settled principles. And the result is a broad and general uniformity of moral judgment, subject to gradual variations in the manner we shall afterwards consider, but very nearly constant within such limits of time and place as give us for practical purposes a sufficient range of observation. This is every man's experience, and we dwell upon it just because it is so familiar that there is some little difficulty in consciously reflecting upon it. When we appeal to the moral sense of mankind—meaning thereby the civilized part of mankind whose character and circumstances are like enough to our own to make their opinions worth considering—or more specially, as we sometimes do, to the moral sense of Englishmen, we mean that there is a certain way of thinking on questions of morality which we expect to find in a reasonable civilized man or a reasonable Englishman taken at random, and from which we may infer with some probability what his judgment will be in a given case.

But as this uniformity is merely natural, not conventional, so we have to take it as we find it, and must forego any such means as in the analogous case of positive law may be furnished by judicial institutions and the conventions of legal doctrine and procedure for keeping it whole and unbroken. In our highly developed system of law we get each new case that arises decided by a court whose decision is binding hereafter on itself and all courts of equal or less rank, subject to the higher authority of the Court of Appeal, and with an ultimate resort to a tribunal whose judgments are binding on itself and on all other courts which administer the law of England. Beyond this, again, we have in the Legislature an unlimited power of removing doubts by consolidating, explaining, and recasting the law that exists, or making new laws, or combining these processes as it may think fit. Even with all these provisions the result is only an approximation to certainty. But in the system of positive morality no such apparatus exists. There are no courts and no legislature; we cannot appeal from the opinion of one set of men to that of another set of men with the knowledge that the judgment of these last is competent to overrule that of the first and set aside its consequences, or else to confer upon it, by affirming it, a distinctly higher authority than it had before. The ethical decisions of the community have no express mouthpiece. Our only tribunal is an ideal and abstract one; the practical judgment, as Aristotle saw long ago, must measure itself by the imagined judgment of the reasonable man. It must

here be noted that we are speaking to Englishmen, and of the state of things which we find in England. We do not forget that at sundry times and in sundry ways attempts have been made, and that one at least is still being made on a large scale, to set up a kind of ethical judicature, and to put ethics on the footing of positive law. Thus a large party in the Roman Church regards the Pope as being in a strict and proper sense the final judge (if not also a legislator) in questions of morality, and his formal decisions on such questions as being indisputable all the world over in like manner as the decision of the House of Lords on a point of English law is indisputable in England. And this kind of assumed jurisdiction has been by no means without effect in human affairs ; but the moral and political instincts of laymen have almost everywhere been against it with all their might, and even where they have not, as in England, decisively cast it off, have forced it to be content with a dominion very far short of its professed aims. Here in England this opposition is so strong that at the present day we may well esteem it a constituent part of the English moral sense. There is settled in the English mind a deep and peculiar repugnance to the scholastic and quasi-legal method of dealing with ethical questions which follows as of course from the assumption that they are to be disposed of in the last resort by some definite and organized authority. This being so in common experience, we shall proceed, as we have set out, upon the footing of the Greek and English understanding of ethical knowledge ; to wit, that ethical judgments are



not organized, and that we do not expect them to become so.

Yet these judgments, being neither formally given nor formally preserved, do nevertheless make up a body of fairly uniform tradition, of whose contents any reasonable man has a kind and amount of knowledge which is useful, and in the main sufficient, for the guidance of his life. We may be helped to understand this state of things by comparing it, not with the refined and artificial completeness of our English system of case-law, but with the working of such legal systems as exist in France and other Continental countries, where the law is not conclusively settled beyond the particular case by the judicial decisions of even the highest court. The courts not being bound by precedent as they are with us, decided cases do not make case-law such as we understand it. Still the decisions of the courts are reported and discussed, and mingle with traditional ways of thinking preserved by the text-writers, and from time to time enriched and modified by their comments and speculations, to form a more or less ascertained body of opinion which has great weight. The French advocate can no more afford to neglect the *jurisprudence*, as it is called, of a particular branch of the law than an English barrister can afford to neglect the reported cases; and one may say, speaking generally, that the working of the two systems is to a considerable extent alike. On this plan the only final test of any conclusion is its general acceptance by the best professional opinion; the last resort, just as in the natural sciences, is not to any

specific authority, but to the collective judgment of experts. The method that guides a French lawyer is in the eyes of an English lawyer exceedingly vague and uncertain compared with his own; nevertheless it exists, and does useful work. This gives us a much closer analogy to the process of ethical judgment; the less formed method of Continental jurisprudence stands between the fully formed system of prediction in the practice of English law and the entire absence of form in the practice of ethics. The standard of ethics is to be found, in fact, at any given time in the general result of a mixed mass of decision, practice, and discussion, and the last resort is to a collective opinion. But we must not speak here of the collective opinion of experts, because, as we said above, every right-minded citizen is an expert. This is the reason why the ethical judgments of the commonwealth are and must remain informal, and why we resent, as likewise we said, all attempts to set up a formal jurisdiction in morals; for right-minded Englishmen do not choose to have any man set over them to treat them as mere laymen in the art of conduct. The results thus obtained are not so certain, or so capable of being made certain, as if they could be settled by any formal appeal; but there is nothing to prevent them from being certain enough to be of the greatest practical use, and this is found to be the case, though by a natural illusion we often fail to perceive it. For as, in thinking of law, most men are apt to dwell too much on the difficult cases where disputes arise, and too little on the plain cases where disputes are pre-

vented, so, in thinking of moral rules as they exist in practice, one is apt to dwell too much on open and unsettled cases of conscience, and too little on the innumerable matters of daily conduct where duty is quite plain, and the only difficulty is to do or to get done what is perfectly well known as the thing that ought to be done. When a new case does present itself, it has to be dealt with in just the same way that a lawyer or physician deals with a new case that arises in his practice ; as Mr. Grote has it, “ a man is forced to put together in his mind the various analogies which his former experience has presented to him, and to apply the result to the case before him ; ” only the experience which is consulted is not proper to any special class, but common to all men living in society. This process, however, is not always consciously performed, and it may be no worse, or even better performed when it is unconscious ; and this is borne out by what we know of the judgment of experts in the special practical sciences, who constantly form their opinions without being able to give an account of the process. This habit of instinctive moral judgment, acquired by living in society, and analogous to the instinct of the expert in a particular branch of knowledge, is what we specially denote as the moral sense.

The foregoing considerations may perhaps help to throw light on the practical or dynamical aspect of positive morality, and the manner of its work in men’s daily life. We have now to call to mind that all this time we have assumed, for simplicity’s sake, that ethical judgment proceeds merely on the rules of

positive morality, conceived as being in fact established under the social sanction. But this is not exactly true, and we have yet to take account of other elements which are derived from the conception of an ideal standard of morality as distinct from the actual standard at the time and place. To this complex conception we must next address ourselves, and in so doing we shall seek further aid from the same analogies we have heretofore made use of.

### III.

The ethical judgments of mankind, or of the more thinking part of them, are framed not only upon the existing standard of positive morality, which alone we have hitherto considered, but also with regard to an ideal standard; so that a man who is thoughtful as well as right-minded will himself obey moral rules which differ somewhat from those commonly recognized in society, whether as being more extensive and precise or as being, in some exceptional cases, in actual conflict with them. He will often say, Thus I ought to do, though the common voice would not blame me for leaving it undone; and sometimes he may have to say, Thus I ought to do, though the common voice bids me not do it. Let us try to understand more closely this notion of an ideal standard, and see how it is built up. It contains two distinct elements which are inevitably mixed up in practice, but which we must now keep apart in thought. First, there is an ideal which is developed from within by means of the principles of existing

positive morality, and in the practical work of solving new problems in conduct. All men have not the same power of perceiving analogies and following out consequences, and when admitted principles have to be applied to a complex particular case the conclusions of right-minded men may well differ. Hence there is a discrepance of moral judgments within certain limits; and here, if we mistake not, the comparison of case-law will still be helpful. Again, there is another kind of ideal which is set up, as it were, outside existing moral rules, and is formed by the assumption of certain principles or ends as being the best in themselves, so that the rules of every particular society are good or bad in proportion as they follow or swerve from the direction thus laid down. This ideal is an ultimate assumption in so far as it bears on positive morality. For this purpose it is taken as paramount, although it was itself obtained by one or more of several ways which are themselves open to discussion, and have been very much discussed; for some hold that a number of general rules are or may be intuitively known, or are given by some absolute external authority; others, on the contrary, say that all rules are to be tested by reason according to their tendency to further or hinder, in the society governed by them, an end variously defined; and these opinions admit of subdivisions, combinations, and compromises on which we do not now dwell. Thus we have two kinds of ideal standard, the one practical, the other speculative. The first standard is wholly within the range of what

we have called Dynamical Ethics; the second, or speculative one, is wholly without it, and belongs to what we have called Final Ethics. There is no formal connexion between the two, nor is there any difficulty in conceiving them to be in actual conflict; for example, the tendencies as well as the actual contents of social morality in a Protestant country must seem to an Ultramontane citizen of that country to be different in many ways from what they ought to be.

We must now return to our comparison for the further working out of these points. In the decision of a new case by a court of justice, or the opinion formed upon it by a legal adviser, there is something more than the application of specific authorities and analogies. The judgment is more or less determined by a wider and yet a subtler kind of thought—a feeling rather than insight springing from the consolidated impressions of an experience acquired by the individual or handed down by the tradition of books and professional converse, of which experience the several particulars are too scattered, extensive, and remote to be distinctly recalled. This massive undistinguished feeling is always present when the reason is exercised on professional topics, and gives rise to a certain continuous drift of thought which is called the legal habit of mind: and every new piece of specific experience adds something to the consolidated stores of memory, so that the sum of mental resources which plays the like part in dealing with the next instance is not exactly the same. As the habit counts in determining each judgment, so does

each judgment react on the habit; we see plainly that this must needs be so when we reflect that the habit was formed in the beginning by the accumulation of separate judgments, though we cannot say that it is now so formed in any one man's mind, inasmuch as a large part of it is taken over by him ready-made in the course of his learning and practice. Accordingly the particular judgment is framed in accordance with the legal habit of mind thus present in the individual; and this alone would suffice to beget the notion of a general type or standard to which, no less than to the rules of law that may be distinctly applicable to the case in hand, every particular decision has to conform. But again, this habit is formed not in one man only, but in a great number of men of different tempers and capacities, a great part of whose business is to discuss one another's conclusions. Every man's professional judgment will be more or less coloured by ways of looking at things which are peculiar to himself; there is a "personal equation" for the perceptions of the reason as well as for those of the eye and ear. Partly because of these peculiarities, partly because of the difficulties inherent in the subject, and the occasions of error which are common to all processes of reasoning, opinions are found to differ widely; the differences become known, and a choice has to be made between them. The choice is ultimately determined by judicial decisions, but may be provisionally determined by a prevailing consent among those who give their minds to the point; a question may be open, but yet so that there

is a "better opinion," as the books have it; and this weight of professional opinion is, in fact, not the least of the elements to be reckoned with (in certain branches of law, for special reasons, a very important element) when the question does come to be decided by authority. In this manner there goes on a gradual and steady convergence of individual judgments under the guiding pressure partly of decisions and partly of the collective opinion of experts; this convergence, moreover, will mostly have at any given time and on any given topic a definite tendency which may be discovered by the competent observer. The collective opinion which thus overrules and corrects individual opinions is not to be found in any one man or group of men; for even a court of final appeal is bound by it, and the power of directing its further growth which such a court does undoubtedly possess belongs not to the men but to their office. And thus we have the notion of an ideal standard set above the judgment of any single expert as a test whereby its rightness or wrongness in the particular case may be shown. Again, the common drift of convergent professional thought to which this notion corresponds is grounded on a mass of common experience, just as, when we regard the habit of mind in the individual alone, we perceive it to be grounded on the mass of his own experience; and this active sum of experience, as in the case of the individual, is itself enriched and modified by the result of each new instance to which it is applied. It will be observed that much of the foregoing description is in perfectly general



terms, and holds equally good of every kind of knowledge. But the fact that it is true of legal knowledge is important to us in a special manner, for this reason, that law determines, so far as it goes, a practical art of conduct; and we have seen how an ideal standard is here constructed by the natural working of decision and discussion within the region of positive law, and without reference to any external test.

Now it is really matter of common experience that much the same process goes on in the construction and enlargement of positive morality, and the steps of it might be described by an almost verbal repetition of what has just been said. The chief differences are these. In the case of law the process which overrides individual opinion and fixes the common standard is artificially hastened by the organized methods and the conventional authority of judicial decisions. In the case of ethics we have no such means, nor can we wish to have them, for the reasons already given. Another difference is that the profession here in question is not a special one; it is the calling of every citizen, and no member of a permanent society can escape from practising it well or ill from the time that he attains years of discretion. The former difference is more or less conspicuous, as we take for comparison a highly-wrought system of law, such as our own, or one where method and convention are less fixed; the latter is constant and fundamental as far as we are now concerned, though both alike might be found to vanish in those archaic states of society where law and morality are imperfectly distinguished or undis-

tinguishable. Hence the directing power of ethical opinion is comparatively loose and diffused, and the "margin of conduct involved in obscurity and perplexity," as Mr. H. Sidgwick calls it, is larger than in the case of other practical arts depending on special knowledge. Still, for the very reason that the standard is less certainly fixed, the new ideas contributed from time to time by practice and opinion are enabled to react upon it all the more surely and quickly. The process of development cannot be curbed by authority; there can here be no fear lest the decision of a court, afraid of new things or embarrassed by precedents, should arrest the widening and improvement of old rules according to the needs of the time.

For the same reasons it is hardly possible in the guidance of one's own conduct, or in discussing that of others, to keep this practical ideal distinct from the speculative ideal, which in one form or another is assumed explicitly by some few men—namely, students of moral philosophy—and implicitly by most, as the ultimate test in ethical questions. In a case of any real doubt we can seldom inquire whether an action conforms to the existing moral rule without likewise inquiring what the rule ought to be, not only according to the analogies of existing morality, or as measured by the practical ideal, but according to our opinion of the worth of moral rules in themselves, or what they ought to be as measured by the speculative ideal. The two inquiries run into one another from the first, the more freely because we are dimly conscious that speculation reacts upon practice. And we

may note that even in the case of English law, notwithstanding express protests of judges and books to the contrary, we find that practice is in fact worked upon within certain limits by that kind of speculation which we have ventured to call final jurisprudence. It is constantly said that judges are not to decide what ought to be the law, but must leave that task to the legislator—informed or not informed, as the case may be, by some more or less reasonable theory of legislation; but it is constantly found that they do so decide when positive law, so far as already ascertained, is silent or ambiguous. The same thing happens in the unorganized judgments of positive morality, but with less disguise and without assignable bounds.

It is difficult to measure the relative importance of the speculative and of the practical standards in the formation of particular moral opinions. The tendency of moral philosophers has perhaps been to exalt somewhat unduly the speculative standard at the expense of the practical; and the authority of venerable names may be vouched even for the opinion that it is the normal function of the individual conscience to protest against rather than to follow out the dictates of the common judgment, and that casuistry is not the minister but the opponent of positive morality. Statements of this kind, although they contain truth in so far as they affirm by implication that gradual interaction between established results and novel instances of which we have spoken, yet appear to us to be on the whole unfortunate. For a little reflection will show us that anything like actual conflict between

the existing standard of positive morality and the speculative standards of moral and political philosophy cannot be found on a large scale, or as a persistent state of things. We need not for this purpose enter upon the historical analysis of the manner in which existing ethical rules have in fact grown up; nor would this method be competent to show more than an agreement in general scope and intention between the various courses taken, consciously or unconsciously, by the social motives and actions of the forefathers to whom living generations owe it that moral feelings and the moral sanction have risen to their present pitch. And such an agreement admits the widest divergences as to the means that may be chosen at different times and places, or by rough practice on the one hand and deliberate speculation on the other, as best fitted to further the supposed common end. But so long as we confine ourselves to one society, or even to a number of societies bound together by a common heritage of knowledge, feelings, and interests, as are at this time all the civilized peoples of the world, it may be seen that more powerful and immediate causes are at work. First, there is this same constant interaction of opinion and practice, which is furthered by the spread of knowledge and by increased means of communication. Next, any speculative standard of morals which may be proposed as the final test is itself the work of human and social intelligence. The philosopher who frames it has himself been brought up among ethical associations, and has acquired strong ethical habits of mind long before he is able to reflect

upon them. Hence it is only in the rarest cases that it is at all possible for him to construct in earnest and offer to his fellow-men as a guide to conduct an ideal morality, from whatever premisses it may purport to be deduced, which shall in substance contradict the leading rules or the general tenor of the morality to which they have been accustomed. He will rather seek to establish a theoretical foundation for the precepts which all admit in word, and with more or less shortcoming obey in deed; on minor and unsettled points speculative opinion is free, but it will hardly wander outside that margin of unsettled questions within which, as we have seen, the purely practical opinion is likewise free. Again, the same reasons which make the existence of eccentric speculative standards unlikely will still operate, whenever such standards do come to exist, to make it still more unlikely that they should obtain any general acceptance. Men will not suddenly barter their inherited maxims of right and wrong for philosophic ideals. Even cultivated men are as a rule unwilling to meet moral paradoxes with argument; they simply say the philosophy which gives such results must be wrong; and on the whole they are quite right. We are fully aware that there are on record all kinds of imagined novelties in ethics, or mixed ethics and politics, from Plato's Commonwealth downwards, even as we now have imaginary geometries, where parallels ultimately meet, and space is of four or more dimensions. But we have here nothing to do with mere exercises of intellect which no one has seriously attempted to

carry into practice. And we seem to be justified in concluding that the plain right-minded man, who takes positive morality as he finds it, and acts upon it to the best of his lights, will at the last be justified by philosophy, and that the fruits of his life, no less worthy though nurtured with less art than those of the philosopher, will surely be gathered into the firm and ancient treasure-house of the knowledge of right and wrong, wherein is the safety of cities and the most excellent wealth of nations.

## XI.

## ETHICS AND MORALS.

## I. SPECULATION AND PRACTICE.

ONE remarkable feature of the revival of interest in speculative problems that has taken place in the last few years is the special attention given to their ethical bearings. Or perhaps we should say that by means of these ethical bearings philosophy has become interesting to large numbers of thinking English people, who were formerly accustomed to look on such studies as mere abstruse trifling. A certain number of competent instructors, in the first rank of whom must be mentioned with all honour and regret the late Mr. G. H. Lewes, have taken the pains to make philosophy and the history of its fortunes speak the common language of educated Englishmen. Having thus learnt that philosophy is more than a speciality, and has to do with matters affecting the conduct of life, our reading public has fairly cast off the old indifference, and is only too eager to hear what philosophy has to say, and chiefly on those matters which come home to men's work and conscience. The difficulty is now, not to create an interest in philosophical questions, but to get the ideas of philosophy translated into plain English fast enough to supply the demand with genuine

wares. Meanwhile the market is crowded with retailers of counterfeit or obsolete ones, and few of the purchasers are in a position to know the difference.

And the difficulties are increased by the direction which men's interest naturally takes. Moral philosophy, as it is the most attractive branch of speculation and the easiest to maintain plausible arguments upon, is also the most perplexed, being not only very difficult in itself, but liable to infinite confusion from prejudice and bias of every sort. It is exposed to all the fallacies common to philosophical inquiry in general, and likewise to others peculiar to itself. One of these, of which we now propose to make some examination, is very apt to run through the discussion, not only of moral principles as such, but of those principles of pure philosophy or mental science from which consequences bearing on action may be deduced. This fallacy consists in confounding the logical connexion and exposition of opinions with the actual manner and motives of their formation, or in regarding man as a philosophical rather than a social animal. It is assumed that our character and conduct are materially determined by the theories we may adopt concerning the origin and nature of moral duties; and on this assumption we are warned in every tone of deprecation and alarm against the terrible things which may be expected to happen if particular theories are admitted to philosophical citizenship. This attitude is mostly found in the defenders of systems which have been officially accepted, and have a kind of presumption in their favour by possession. So far from being enabled by



this advantage to look around them calmly, and measure their strength with that of the new-comers, they fall into extravagant apprehensions, and waste their power on appealing to the terrors of the ignorant. An ancient and favourite line of argument in ethical controversy is to make out that your opponent's principles lead to conclusions inconsistent with the common moral judgments and behaviour of good men. And this is fair enough so far. For, whatever view may be taken of the origin of moral beliefs, nobody can deny that great weight must be given in the meantime to the prevailing opinion of the society in which we live. If we refer morality to a source above experience, a widely spread moral sentiment is presumably traceable to that source, though it may possibly not have escaped corruption. If we refer morality only to experience, then such a sentiment bears witness to the results of long experience, though by possibility the experience may have been ill understood. The disturbing force of artificial education is another possible source of error, but is equally so on either hypothesis. Either way, therefore, the burden of proof lies on the theorist who undertakes to show that a generally accepted opinion in morals is wrong; and in some cases the burden is manifestly so enormous that we rightly consider it not capable of being seriously and soberly undertaken.

But the zeal of controversy very seldom stops at the point here indicated. Not only violent feats of dialectic are performed in the way of deducing conclusions repulsive to common morality from philoso-

phical doctrines unacceptable to the disputants' private judgment, not only are the doctrines themselves often distorted and exaggerated, but whoever shall accept the obnoxious theory, whatever it may be, is threatened with the ruin of his personal virtue and happiness. "I have shown you," cries the officious moralist, "that on my theory the foundations of morality and the reasons for being a good man are so and so. I have further shown you that the speculations of this impious innovator destroy my foundations and leave no room for my reasons, which, as I have told you, are positively the only sufficient ones. If, therefore, you accept such principles as are now offered by my adversary, you have, by all the rules of logic, no title whatever to be a good man. Be warned in time, lest by listening to the deceiver you become wicked and miserable." In this form, however, the argument is something musty. Divers ingenious persons holding opinions contrary to the official ones on divers matters of faith and speculation have, in sundry times and countries, perversely and obstinately continued to be good men, good companions, and good citizens. Instead of exhibiting in action the wickedness which ought to have flowed from their principles, and dying in torments of remorse, they have lived in charity with their neighbours, and (when they were allowed) died in peace. And, what is worst of all, these facts have been too notorious to be in any way got over. The argument from fear is therefore presented nowadays in a more refined shape. "It is very true," say our would-be champions of morality, "that individuals

who rejected our principles have been good men. But that was because they had the inestimable advantage of learning practical morality in a society where our principles were accepted. Their virtue is a mere continuance of the habits formed in our authentic mould. Once let their ideas become current enough to leaven a whole generation ; once let our only true and original mould be broken, and then you shall see how morality will go to pieces. A truly painful duty is ours, indeed ; we would hurt nobody's feelings for the world. Our only comfort is that we have warned you in time : you may not be wicked and miserable yet, but if you go on at this rate your children will be."

This kind of argument is much more plausible than the other ; and, to judge by the frequency of its repetition, it appears to be thought successful. But if we test the prophecy by history, we shall hardly find it better warranted on the larger than on the smaller scale. Its plausibility rests on the general ignorance that prevails, even among educated people, as to civilizations and systems of belief different from their own. The truth is that civilized morality, in all essentials as we now understand it, has been professed for ages by bodies of men holding the most widely discordant speculative opinions. Let us take, for example, a Jew, a Stoic, and a Buddhist, say in the second century after Christ : assuming, as is only fair, that each system is taken at its best. Probably we should be safe in adding a disciple of Confucius ; but three are sufficient for the purpose. We shall find that all these agree in the cardinal points of human duty. They all

set before themselves as the rule of life the exercise of justice, truthfulness, temperance, love to one's fellow-men, and forgiveness of injuries. On sundry lesser matters they differ, but rather in addition than in omission. The Jew and the Stoic attach more or less importance to ritual and ceremonies; the Buddhist holds it a dangerous delusion to rely on such things. The Jew and the Buddhist make a point of abstaining from things which to the Stoic are indifferent. The Stoic and the Buddhist agree, as against the Jew, in setting a much lower value than he does on the common enjoyments and amenities of life. Their answers would also be undecided or discrepant on one or two points which modern society has defined. But in the main we should recognize them all as partakers in our common morality. Now they represent three distinct views of the constitution of the world, its relation to man, and man's purpose in life, which are as divergent and inconsistent as they can possibly be. They would all allege perfectly different motives for a righteous way of living; and, if asked how they knew which way was that of righteousness, they would no less return wholly different answers. We must conclude either that very similar moral precepts may be deduced with equal cogency from very dissimilar speculative doctrines, or that the moral precepts are not really adopted on the strength of the speculative beliefs.

One of these conclusions would serve our turn as well as the other for controversial purposes. But, if we would understand the fallacy thus exposed and the strength with which it haunts men's minds, we must

proceed to note that the first alternative is not, on the face of it, probable. By dismissing this and pursuing the second, we shall perhaps get some light on the formation of moral theories. What really happens is testified by common experience in both individuals and nations. The general notion of duty or obedience to a rule of life is acquired, and the general precepts under which particular cases of duty fall are settled, before any attempt is made to explain what duty is, or why one's duty in the particular case should be thus and not otherwise. When man reaches the stage of philosophical questioning, and communes with himself of morals as of other things in general, he comes to the task with morality ready-made and in full work. His real object is not to find speculative principles and deduce morality from them as if morality had to be invented for the first time, but to assign principles on which to give a rational account of the morality already familiar to him. A system of ethics is a scientific hypothesis for the explanation of existing facts. But this is often not clearly understood. The framers of early theories knew nothing of the distinctions between fact, hypothesis, and dogmatic assumption. In the absence of critical training men who are accustomed to view facts in the light of a particular hypothesis come to think that the facts cannot do without it. And in the case of morality this illusion is greatly fostered by the current belief that the opinions and sentiments of mankind are not to be treated as natural phenomena. The moral feelings and perceptions that prevail in a community are really just as much facts

in its natural history as the temperament, health, and length of life of its members ; nor will they be altered by our ability or inability to find adequate reasons for them.

For the better marking of the distinction here pointed out, I propose to appropriate the term "Ethics" and its derivatives for the scientific analysis and exposition of conduct, whether it be on historical, physiological, or psychological grounds ; and on the other hand to keep "Morality" and the kindred group of words for the region of precept and command. Thus an art of morality exists, and is cultivated with more or less success, in every society of men sufficiently advanced in the art of living to hold together at all. A science of Ethics comes into existence, and is cultivated with more or less success, only when the society becomes sufficiently civilized to produce men who think systematically. That the art exists before the science is obvious ; for morality must be well established before that security and leisure can be found which make ethical speculation possible. And ethical speculation arises just because morality is there as a subject-matter to be accounted for. Morality and its precepts are not dependent on Ethics, and the practical success of mankind in developing morality cannot depend on the amount of success that may attend philosophers in their endeavours to give an account of the process. Even if we supposed that as soon as a man begins to philosophize he casts away all his former habits and experience and governs himself wholly by philosophical reasoning, this would

apply at most to a small minority ; but the supposition is manifestly contrary to fact. The science of ethics arises in a moral community as the science of optics arises among men who see, and the science of physiology among men who breathe and eat and are nourished. I am far from saying that ethical theory has, or should have, no influence on moral practice. From optics we have got spectacles and telescopes, and from physiology rational medicine ; and from ethics we may learn much that is profitable for education and government. But a man of normal sight does not want optics to make him see ; a man of sound organs does not want physiology to make him breathe and digest ; nor does a right-minded man want ethics to make him know right from wrong. On the other hand, if abnormal sight is corrected by lenses, or abnormal conditions of organs by medicine and regimen, or moral infirmities by education and reformation, the result of the process depends on the knowledge and competence of the persons who apply it, or by whose instruction it is used, not of those for whose benefit it is applied.

What, then, will take place if a well-conducted man, or a number of well-conducted men, find the theory of morals hitherto accepted by them to be no longer tenable ? Are we to believe, according to the denunciations of our augurs, that they will straightway plunge into immorality ? We think better of mankind than to believe anything of the sort. Some distress and discomfort of mind may be suffered in the supposed case ; it is always unpleasant to give up a

theory, even when its interest is purely scientific. But the conclusion arrived at, on the whole, will be not the illegitimate one that morality is a delusion, but the legitimate one that the former theory was erroneous or inadequate. The bolder minds will strike out a new doctrine, the less enterprising will alter and patch up the old one. There may be partial unsettlement for a season, but in the long run the practical cultivation of morality will fare none the worse. In course of time, unless men are unusually vigilant and open-minded, the new theory may be thought as indispensable as the old one, and will be dressed in its trappings of authority till the process has to be repeated. Not that the real working principles remain fixed and unchangeable. Changes in those principles do take place from time to time; but, so far from being determined by changes in the accepted theories of ethics, they precede and determine them. One great moral advance made good almost in our own days is the establishment of the principle that slavery is wrong. It is a commonplace that nothing like a distinct condemnation of slavery is to be found in any document or tradition which Christians accept as binding; and only three centuries ago the most orthodox of nations were foremost in enslaving Indians and negroes, not merely without scruple, but actually in the name of religion. But when persons more advanced in morality than their fellows began to feel strongly that slavery was wrong, they discovered that it was inconsistent with Christian principles. In other words, they expanded their ethical theory to fit



the new development of their moral sense. Just as the law which is enounced in deciding a new case is by an inevitable fiction conceived as having always been the law, so the moral rules proceeding from the invisible and informal judgment-seat of righteous men, which yet is more powerful than any prince or legislator, are referred to doctrines originally based on a far narrower foundation.

## II. THE SANCTIONS OF MORALITY.

We shall now examine another fallacy commonly found in company with that which has just been discussed.

Theories of ethical obligation, especially those which claim some authority greater or other than that of scientific probability, may and often do include specific doctrines touching the motives and sanctions of right conduct, in so far as it is considered in the light of obedience to a law. Now it is said that if we discredit a current theory of ethics we thereby discredit the existing motives and sanctions of morality, and incur the risk of morality itself being destroyed. And, what is perhaps more important, this or something like it is thought by many persons who do not say it, and influences the thoughts and habits of others who do not consciously entertain it as a distinct opinion. We shall observe, in the first place, that this proposition, and all propositions of the same form and tendency, run counter to an ethical maxim of the first importance and of the largest application. The maxim in question is that truth is to be sought at all hazards :

and the proof of it is the whole history of civilized mankind. Disinterested searching after truth has, in one way or another, given us a large proportion of the benefits we enjoy ; while indifference and hostility to free inquiry have produced infinite mischief of all sorts. Hardly a single capital discovery in science, hardly a single fruitful idea in philosophy, has escaped attack as dangerous to religion and morals. Had these objections always prevailed, not only small-pox might at this day be decimating us unchecked, but we might be offering human sacrifices to propitiate the peculiar demon of the disease. But we proceed to a more particular answer.

The moral alarmist says that our morality consists in obedience to certain precepts, which is determined by the motives and sanctions expressed in current ethical theories. He places it, in other words, in current religious beliefs ; for most people have no ethical theory save what may be contained in the religion they profess, or may have been deduced from it by its expounders. He further says that if these motives and sanctions be removed there will be no morality left. This involves two assumptions of some extent. First, that right conduct is nothing but obedience to a law ; whereas it is a great deal more, or rather obedience to a law is not right conduct, but only a step towards it. Righteous men are not they who obey moral precepts, but they whose conduct is the foundation of moral precepts : and the wisest and best of men have always said that obedience to precepts is not righteousness, but only the beginning of

righteousness. Next it is assumed that the motives and sanctions of the existing body of moral laws are completely given by the current theory which happens to prevail ; whereas the most important motives and sanctions are those which operate without being perceived, and consequently are not expressed in popular theories. The assumptions thus made are in truth not only untenable but extravagant. Let us consider a little more nearly the nature of the moral law and its sanctions. The general notion of sanction is now pretty familiar to educated English readers, but it may be as well to recall it to mind. Sanction is that which gives point to a command ; and sanction and command go together to make up law in its fully developed form. The command is addressed to subjects of whom obedience is required, and the sanction is some evil which they are to expect if they disobey. It is admitted that the precepts of morality on the one hand are not laws in the strict sense, and on the other hand have considerable analogy to laws. Whether they are in any and what sense commands must be left open for the present ; but that evil-doing brings evil consequences is the common theme of all moral teachers. The apprehension of these consequences will have just the same effect as if they had been threatened by a superior power able and minded to inflict them in the contemplated event. They are therefore in the nature of sanctions. In this sense, indeed, the so-called laws of nature have their sanctions ; for, though it be quite indifferent to the universe whether I put my finger in the candle or not, it is certain that if I do put my

finger in the candle I shall burn it. And if I say to a child, "Do not put your finger in the candle, or you will burn it," I make my knowledge of the natural law, coupled with the child's presumed belief in my knowledge, a real sanction by which my command is pointed. Observe that in considering individual motives belief in the sanction is material. In the theory of legislation this point of view does not occur, because the legislator will take care to provide sanctions which are notoriously real and substantial; and real and notorious facts are, on the average and in the long run, believed in. But for the individual a sanction may be wholly neutralized by delusion; as if a Mussulman fanatic murders an English officer, supposing that he will be supernaturally rescued, or else, which will do as well, expecting to be hanged but also to be conveyed immediately thereafter to Paradise. On the other hand an imaginary sanction, so long as it is believed in, will be quite as efficacious as a real one. Some sects of orthodox Hindús are taught that the man who eats flesh-meat will in future lives be eaten in turn by every one of the animals whose flesh he has consumed. The Hindú who really believes this obviously has the strongest possible motive for abstaining from a flesh diet; and the belief might even be competent to produce in the course of generations an apparently instinctive abhorrence. But it is also obvious that such a belief could never have arisen among habitual eaters of flesh-meat. Being wholly devoid of evidence, it could gain acceptance only in the traditions of people predisposed to

receive it. Whatever effect it may have in later times in maintaining the believers in the same disposition, it is one of those artificial bulwarks of custom which in their inception are plainly afterthoughts. A little consideration may show us that the example comes much more nearly home to ourselves than we are apt to suppose.

We have admitted that an imaginary sanction may be as efficacious as a real one. The conclusion may be suggested that it is a rash and unadvisable thing to discredit imaginary sanctions as long as any one believes in them, or even to attempt the task of discerning the real from the imaginary ones. But let us go back to our Hindú, and let it be assumed for the argument's sake that climatic, economical, or other conditions exist which might reasonably appear to an unprejudiced observer to furnish good and sufficient reasons against Hindús eating flesh. Supposing it to be a probable opinion that on these grounds it would be against the interest of the Hindú community to adopt an animal diet, let an unprejudiced European observer be asked whether it is desirable that Hindús should go on holding their dogmas of transmigration, including the retaliation to be inflicted on flesh-eaters, or that they should acquire more rational views of the constitution of the world and the relative importance of moral duties, even at the risk of a certain number of Hindús departing from their ancestral food, and being (as we suppose) the worse for it. Very few Europeans, probably none, would answer that Hindús had better go on believing that whoever eats beef will

in turn be eaten by the ox in a future life; and certainly none would venture to say that it is the duty of enlightened Europeans to offer any particular opposition to the decay of this belief. A Brahman might find many plausible reasons for challenging the answer of the supposed intelligent stranger. Why not maintain, he might say, an ancient fiction which does no harm, and which, by the hypothesis, is directed to a useful end and may possibly do good? The European, if he is a man of strong common sense and moral feelings, will probably rejoin at once that it does no man good to believe a lie. If he has patience to go farther, he will observe that the maintenance of imaginary sanctions for precepts of any kind is not only immoral but impracticable. The fiction will in spite of all precautions be sooner or later found out; and the more pains have been taken to conceal its real character, the greater will be the ill effects of the discovery. The more you seek to enforce wholesome precepts by fictitious reasons, the less, in all probability, will the real reasons be attended to; and when at last the fictitious reason breaks down, the greater will be the danger of the precept itself being involved in its ruin. But perhaps it is disputed whether the reason be fictitious or no. Very good; if it be fictitious the sooner it is abandoned the better; if it be real it has everything to gain by full discussion. But perhaps the mere fact that the sanctions of morality are discussed may unsettle people's moral convictions; discussion is for the robust, and we must not tempt the weaker brethren.

To this we say that the man whose moral convictions are liable to be thus unsettled has not attained real morality at all. He must be one to whom morality is a law and nothing more, and he must be willing if not eager to find an excuse for breaking it. And if he does not find his excuse in one way, he will find it in another. It is no reason whatever for being faint-hearted in the search for truth that foolish persons may peradventure wrest the truth itself to their own confusion.

If there is any real danger it is of the alarmist's own making. He has cried long and loud that the whole frame of society and morality hangs upon the acceptance of certain disputable and disputed propositions; and if he cries loud and long enough, it may well be that a certain number of mankind will believe him. So believing, they may live to see the weakening or the downfall of the doctrines on which they have been artificially taught to pin their moral faith; and in this manner it may come to pass that their last state is a good deal worse than their first. The sowers of pious fiction reap hunger and emptiness, and then cry out against honest men for taking away their consolation. They sit whining and bickering over the ashes of their dead illusions, fit to be likened only to the Athenian survivors of the plague described by Lucretius as wrangling over the funeral piles of their kindred—*rixantes potius quam corpora desererentur*. There is only one remedy, which is to discard all fiction and all connivance at fictions—to seek for such grounds of morality as are clear and certain, and to

hold those fast. It is not a very difficult matter for men who are able to put themselves on free and careful inquiry to see that the sanctions of moral conduct, so far as it is within the range of sanctions, need not be derived from any region beyond common experience, but are implied in the constitution and the very existence of society itself. With this inquiry let us proceed.

Concerning the sanctions in question we have seen that their immediate efficacy depends on their being believed in, and that consequently whenever the belief in a particular sanction is impaired the sanction is to that extent inefficacious. Hence it is of the first importance that in common thought and discourse, and more especially in education, we should dwell upon those sanctions of morality which are both real and certain. A standing and effectual sanction must be real; for if it is not, it will sooner or later be found out. Also it must be certain; for if, though possibly it may be real, its existence is open to doubt, and likely to be doubted by any considerable number of persons, its effect will be variable and precarious. Moreover, it must be general; that is to say, it must not be in its nature dependent on the beliefs, habits, or institutions of the particular community which we consider as subject to a body of moral rules. For when mankind begin to distinguish the notion of morality from that of tribal or national custom, they also begin to conceive of morality as something cosmopolitan and belonging to all reasonable men of what country or kindred soever; or rather these are



two ways of describing one and the same process. We shall therefore endeavour to find a sanction which fulfils the conditions thus laid down; repeating, nevertheless, to prevent misconception, that morality is infinitely more than a body of rules guarded by sanctions. Even if it were to appear, on strict inquiry, that moral duties were not merely of imperfect obligation in a legal sense, as not being enforceable by a definitely appointed authority, but that they were not enforceable at all, moral conduct would still be intelligible as the normal function of men living together — the activity of sound minds in sound bodies. Living together would still be the necessary pursuit of mankind, and morality would be necessary as the condition of it. Virtue would still be health, and vice would still be disease. And it would still be reasonable to prefer righteousness to wickedness; just as nobody would choose to be deformed, to be lame, or to squint, though no special punishment attaches to those conditions.

We may first dismiss the whole class of supernatural sanctions, of which an extreme specimen was given in the Brahmanical doctrine of the retribution upon flesh-eaters in other lives. The schemes of these sanctions adopted by different races and nations are so many and so inconsistent that, to say the least, they cannot all be real. Then, as matter of history, they are not certain, being frequently doubted and disputed, not only by the adherents of rival systems, but by thoughtful and competent persons within their own spheres of action, and on ground where every-

thing except reason is in their favour. Least of all are they general. The more we trace them to their historical origin, the more we find them, in their first and authentic forms, to be attached to systems of doctrine and discipline in which law and morality, conduct and ceremonial, substance and form, are mingled in one indiscriminated mass ; the formal and ceremonial parts being often treated as of more importance than those which we now see to be of permanent and general value. Doubtless much accommodation and refinement is effected by the ingenuity of later generations. But what the sanctions gain in reasonableness by these modifications they are apt to lose in force and precision, until they evaporate in the colourless proposition that in some other world, in some manner unspecified and unknown as to time, place, and circumstances, good men will be rewarded and evil men punished. Whether the fear of this indefinite kind of retribution is likely to prevent anybody from doing wrong (and we are now considering the belief only in that light), it is hardly necessary to discuss. On the other hand, so far as supernatural sanctions retain any real power, they retain it very much in the old way and with the old incidents, and thus have the mischievous effect of hampering the substance of morality with a burden of obsolete ceremonial precepts, and obscuring the real importance of moral conduct. They also tend to keep morality itself in an archaic state and hinder its development, since the precepts supposed to be enforced by superhuman sanctions are naturally

regarded as complete and incapable of revision. We are told, for example, how difficult it is to get uneducated Italian Catholics to regard cruelty to animals as a sin. They say "they are not Christians," and think that is a conclusive answer. Morality does nevertheless get developed on the whole, and then the ingenuity of professional interpreters is marvellously fertile of compromises. But the study of their doings is not to the present purpose.

Now let us see whether we can discover a more certain and operative sanction in the natural consequences of conduct. Taking consequences on a large scale and in the long run, it may be said that happiness follows on right-doing, and misery on wrong-doing. Indeed this is almost a necessary truth if we do not admit any transcendental account of the nature of right and wrong. For if the conceptions of right and wrong have been formed by experience, they must have been formed with reference to the observed or presumed effects of different kinds of actions on the common weal of the society in which they took place. The risk of such observations or presumptions being erroneous, which in early stages of society is a very serious one, does not call for special mention in this place. Now the general consequences of human action are sometimes regarded as the chief sanction of morality, as for instance in the common proverb, "Honesty is the best policy." But this sanction, though real and general, is wanting in certainty. The really important consequences of a particular act are often too remote to be evident to

the intelligence of ordinary men; and, what is perhaps a still graver drawback, they very often do not affect the individual agent, but visit his wrong-doing on his family, his descendants, or the community at large. We require something that shall come home with immediate force to the person himself. And if it is to do this with certainty, it would seem that it must be associated with and involved in the very growth of moral ideas. Not that we can expect its operation to be infallible. The most stringent and dreadful sanctions of positive law, including death itself, are often insufficient to prevent disobedience to its commands. We must be content with a sanction capable of restraining most men in most circumstances.

The natural sanction, as we may call it, is a vast and grave one; in its gravest form it is death, not of individuals, but of nations and races. Vice is weak, and the vicious are ultimately rooted out. But this, as we said, is too vast and remote for common use. It is brought home to the individual through the action of society, which applies it in the form of a collective moral judgment. The community, observing and weighing the results of conduct, forms a common public opinion concerning the acts as right or wrong. This opinion, besides defining right and wrong for the particular community, provides a sanction along with the rule. Public esteem and disesteem are the reward and punishment appropriate to the moral law. Trained in his first notions of right and wrong by his parents and masters, and dependent for his happiness on their approval, the

individual gradually enlarges his view of the social bond, and looks for the rule of conduct in a wider and more perfect consent. He aims at satisfying the judgment of his friends, his city, his nation; and, lastly, of an ideal tribunal composed of the best and wisest of men, and representing the moral teaching of all times and countries. Some such ideal tribunal is appealed to even when a man's moral judgment dissents from those around him; he regards his own opinion not as peculiar to himself, but as what public opinion ought to be. The nature and importance of this social sanction of morality, and the manner in which it completes the analogy between positive morality and positive law, were pointed out by George Grote in writings which saw the light only after his death; and, if not for the first time, yet with a clearness and exactness not attained by any previous ethical writer. Now this sanction of public opinion has all the qualities which we require. It is real, inasmuch as no human being is wholly indifferent to what his fellow-men think of him. It is certain, being notorious, in constant exercise, and always ready to operate. It is general in the highest degree, being coextensive with the social life of man and inseparable from morality itself. On the points of certainty and generality there occurs, indeed, an obvious objection. Public opinion cannot be expressed on any action unless the action is known; the efficacy of public opinion as a sanction would therefore seem to depend on the probability of the action becoming known, which may be in itself very

small, or may in some cases be indefinitely diminished by precaution. But man's social feelings are too powerful and subtle to be thus evaded. The sanction once impressed upon the mind follows it even into solitude. In the ideal form which we call conscience the common moral sense of mankind passes upon our deeds and even our thoughts a more strict and severe judgment than could be passed by any actual public opinion. This tribunal is too fully informed to give us the benefit of any doubt, and every circumstance of aggravation is known to it without proof. Hence a right-minded man will expect more of himself than is expected of him by his neighbours. And this elaboration of the moral rule in the musings and self-questionings of men who have a genius for righteousness finds expression in their outward speech and conduct, is first admired and then imitated, is gradually taken up into the actual moral judgments of the society, and thus raises the moral standard for following generations. So that conscience is not only a guide and judge for the individual, but an active power, if rightly used, for the improvement of society. Moreover it is not a conviction, or anything put into the mind by teaching, but an ingrown organic habit; and therefore its reign is indefeasible. Were this populous earth to be devastated by some new fury of nature, and but one man left on its face, he would yet not be alone. Though no more duty or service were possible for him, though in the heavens and on the earth there were no eye to see him, yet so long as thought and will remained uncrushed the

common voice of man would live and bear witness in that one survivor, and the dignity of mankind be enthroned in that solitary soul.

It is true that imagined publicity is not altogether equivalent to actual publicity : the chance of escaping notice is always an addition to temptation, and at times makes it irresistible. But it is to be noted that the power of the social sanction asserts itself even in the cases where it seems to be disregarded. Very few men dare to be individual in their vices or even in their crimes. They mostly strengthen themselves by setting up against the judgment of the community the opinion of some particular class or faction to which they belong ; which opinion, however perverse, is a common social bond to those who share it, and may be a counter-sanction of great power. Thus, while the law of the land and common morality both condemned duelling, the so-called law of honour strongly enjoined it in particular circumstances ; and for many men the law of honour—in other words, of their particular class in society—had a stronger sanction than that of the commonwealth. Common morality, again, forbids drunkenness ; but its command is paralysed in societies where carousing is fashionable. In our own time we have unhappily seen how a low tone of commercial morality encourages the perpetration of actual and flagrant frauds on a large scale. In all these cases it is the failure or laxity of the social judgment that makes individual faults so easy. As regards downright crime, the fact that it is not occasional and anomalous, but has a

regularity capable of being reduced to statistics, depends on the existence of a habitually criminal class; and this class holds together in a crooked bond of its own, and makes a law within itself against the law. The thief is not a being without conscience, but a man of perverted conscience; the approbation of the thieves' kitchen for a successful exploit outweighs with him the disapprobation of society and the terrors of justice. In a larger field of action, the successful breaker of public law relies on the vulgar worship of success to protect him from the sentence that is his due, and hopes to drown the avenging voice of just men in the shouts of the flatterers who hail the saviour of society.

Perhaps we may suspect that the social sanction is really operative, even when some other is put forward. When the pious Hindú starves rather than eat flesh, is he really more afraid of being himself eaten in a future life, or of being shunned by his family and friends as a wretch who has broken his caste? When excommunication was a real and terrible penalty, did the sharpness of it consist more in the spiritual loss and deprivation it was believed to entail, or in being presently cut off from the fellowship and esteem of all good Catholics? Is it really a more grievous thing to be under a threat of future damnation (however sincerely deemed to be genuine), or to be regarded by one's kinsfolk and townsmen and accustomed companions as a heathen and under a ban? At all events a supernatural sanction, as long as it is commonly believed in, carries



with it by the nature of the case the social sanction also, it may be in an intense form ; and, so far as the effect of controlling conduct is actually produced, it is impossible to ascribe it to the supernatural sanction alone.

NOTE.—Since this essay was written and first published, I have found that one of its leading ideas was anticipated by Mr. Shadworth Hodgson in 1870, and it seems to me only just to quote his words. He says in his *Theory of Practice*, vol. ii. p. 499 :—

“ Vain are the fears of the danger to arise from overturning doctrines which have hitherto been believed. Turn to the various religious systems of the world ; what do we see ? The same human nature working everywhere to similar results, with similar conceptions, similar emotions, and through similar stages of development. It is not the doctrines held from time to time, though they may be felt at the time as an indispensable embodiment of the morality and the religion, which are the guarantee of its permanence and of its progress. It is the human nature, their parent, which is the guarantee. Those who complain of new theories as dangerous to religion or morality do too much honour alike to the new theories and to their own. To the new as having power to alter the course of nature, to their own as essential to its maintenance. If the course of nature establishes religion and morality, they are established beyond the power of any theory to overturn ; if it does not, no theory has power to establish them. . . . The same nature, the same mental constitution and laws of its working, which lead us to make virtue and truth, morality and religion, important matters, will also secure their development. It is upon this constitution as it really is that the development depends, not upon the philosophical theories which may be formed of it.”

Quite lately M. Renan has said in the same spirit :—“ Les croyances nécessaires sont au-dessus de toute atteinte. L'humanité ne nous écouterà que dans la mesure où nos systèmes conviendront à ses devoirs et à ses instincts” (*Revue des Deux Mondes*, Feb. 15, 1882, p. 750).

## XII.

MARCUS AURELIUS AND THE STOIC  
PHILOSOPHY.

IT costs us some effort to realize the full importance of philosophy to the Greek or Roman citizen who had received a liberal education. For him it combined in one whole body of doctrine all the authority and influence which nowadays are divided, not without contention, by science, philosophy, and religion in varying shares. It was not an intellectual exercise or a special study, but a serious endeavour to gather up the results of all human knowledge in their most general form, and make them available for the practical conduct of life. We know that Greek philosophy had its full share in the bloodless victories won by Greece over her conquerors; and that the Stoic system was especially congenial to the Roman character, and had a considerable majority of adherents among cultivated Romans. We know that the lives of illustrious rulers and statesmen, and of him not least among them of whom we are now to speak, were formed upon the discipline of that system; and if evidence is ever to be trusted to connect men's actions and character with their professed beliefs, we have abundant and trust-

worthy evidence in this case. These facts are almost too commonplace for express mention ; but it is perhaps not so easy to remember, what nevertheless is undeniable, that for every name which has made Stoicism remarkable in history, there must have been many, now scarcely noted or wholly forgotten, among the men who did the abiding work of the Roman empire in provinces where the follies and revolutions of the palace had little effect. I have called their work abiding, for it is to be remembered that Rome not only kept peace and order throughout an immense dominion inhabited by all races and conditions of men, and governed some parts of the world much better than they have been governed before or since, but set a stamp on the whole frame of the civilized world which in many respects remains to this day. The Stoic philosophy was in no small measure the source of the moral influences under which this work was done. Moreover, its hand can be distinctly traced in the development of legal conceptions and of the law itself.

It is therefore a matter of considerable interest to understand how Stoicism presented itself to the men in whose hands its teaching bore such fruit ; nor is this altogether so easy as might be supposed, for it is one thing to have the tenets of a system laid down in works of professed exposition or discussion, and another thing to seize those elements which really commend the system to those who adopt it in practice. In the case of Stoicism we have abundant accounts of its theory, but for the most part at second-

hand. Nothing has come to us straight from the founders or leaders of the original Greek school. In the latter time Seneca can hardly be counted for more than a retailer. Of Epictetus we have only notes and reminiscences put into shape after his death; and Epictetus, after all, is an official preacher. And this increases the difficulty of rightly apprehending the real working contents of the Stoic philosophy. But the difficulty is happily much lessened by our possession of an almost unique piece of evidence—the notebook of an emperor who was likewise a philosopher, or at least a very apt learner in philosophy. The *Commentaries* of M. Aurelius Antoninus, as the editions call them for the want of a better name, have all the appearance of notes freely set down for the writer's own use, and without any thought of publication. They are constantly abrupt, unfinished, or hardly grammatical; some passages are evidently mere jottings of topics for further writing or reflection, the exact meaning of which can be only guessed at. How or when they were first made public is not known. We have here, then, the substance of the Stoic philosophy considered as a working rule of life, and so considered by a disciple whose opportunities of testing it could not well be surpassed. For although it is commonly taken for granted that men's moral principles are best judged in adversity, one may well doubt whether a position of great eminence and weighty duties does not put them to a more perfect trial.

In Marcus Aurelius, then, it seems to me that we may find the safest guide to the knowledge of the

Stoic morality in its practical aspect and in its relation to the general system of which it was part. The intrinsic beauty of the morality set forth by him, both in substance and in temper, has been constantly admired; but we are apt to forget that Marcus Aurelius was not a solitary apparition of virtue, but the disciple and representative—an illustrious one, no doubt—of a settled and widely-spread doctrine. I am unable to agree with M. Renan that Marcus Aurelius does not distinctly belong to any school. He seems to me, to use M. Renan's own comparison, to have been as thoroughly imbued with Stoicism as the author of the *Imitation of Christ* was with Catholicism. Doubtless his book lives by its human and not by its dogmatic elements, but the dogmatic elements are there. Marcus Aurelius is as much devoted by temper to the philosophic life, though unable to practise it completely, as the author of the *Imitation* was to the religious life. He was too much of a philosopher, indeed, to be a strong ruler of men: he was so loth to punish, and so ready to believe in the goodness of mankind, that much evil-doing of those who governed under him went unpunished. I hope to show presently in some detail how much Marcus Aurelius goes into special points of Stoicism; and I think that for the good things to be found in the *Commentaries* too much personal credit has been given to Marcus Aurelius, and too little to the school which he represents. I hope also to show that the general doctrine of that school, notwithstanding its singularities, or sometimes by reason of them, comes

nearer to our own ways of thinking, and has more lessons for us, than appears at first sight.

Before we examine any specific points of the Stoic philosophy, it may be as well to pause and see what were its aims. It is in some sense true that all philosophers are in search of the same end; yet it is in practice very difficult for a philosopher even to announce his object without showing what method he intends to follow and what sort of results he expects to get. Now the objects of the Stoics were eminently practical; they strongly held that knowledge is for the sake of action, and that the worth of philosophy consists in its power to guide the conduct of life. Among other illustrations and comparisons which seem not very pointed to a modern taste they likened philosophy to a fertile field, logic to the fence round it, and ethics to the crop grown in it. They further said that the knowledge by which action is to be guided is a knowledge derived from experience; and they said it in terms which fixed no bounds to the possible bearing of experience and knowledge upon action. Chrysippus, who was considered to have settled the Stoic system in its finished form, is reported to have stated his ideal of life to this effect:—"A virtuous life is the same thing as a life agreeable to experience of what happens in the course of nature; for the nature of each of us men is part of the nature of the world."<sup>1</sup> How the Stoics conceived of *experience* we learn from Plutarch; experience, they said,

<sup>1</sup> Ritter and Preller, *Hist. Græc. et Rom. Phil.*, p. 363, 3d ed. We are expressly told that with Chrysippus the commoner Stoic form of

is by the multitude of similar (or uniform) perceptions.<sup>1</sup> Thus the knowledge that is to serve us in life is founded on an observed order of things, which order is thought of as something belonging to the whole world, and equally present in every part of it. Now this is exactly such a general conception of knowledge as in these times is growing upon us as we become more familiar with the methods and results of science. And we have here no mere verbal coincidence gathered from scattered sentences; the testimony of M. Aurelius will show that the parallel is a real one. The conception of the world as orderly does not only lie at the root of the Stoic system, and explain, as will presently be seen, many of the things that appear strangest in it; we find it constantly treated as something to be kept actively present in the mind, and capable of affording present support and guidance. This it does in two ways: the first bearing immediately upon action, the other more remotely, but not less steadily, through contemplation. First, a right understanding of the external order of things (*ἡ τοῦ ὅλου φύσις*) is in a manner needful for right conduct. It points out to us not indeed duty itself, but the conditions of our duties. It cannot tell us what our actual duties are; that depends on the specific character of man as distinct from other creatures, and more especially upon his social nature. But it can guide us in judging the circumstances and consequences of speech—"a life according to nature"—was synonymous with this (*ib.* 388).

<sup>1</sup> Ἐμπειρία γάρ ἐστι τὸ τῶν ὁμοειδῶν φαντασιῶν πλῆθος (*ib.* 368).

which we must be in possession in any particular case before we can tell what is really the question of conduct that arises; it does not solve moral problems, but enables us to know what we are about in settling their data. "See whither nature leads you, the universal nature by means of that which happens to you, your own by means of that which you have to do."<sup>1</sup> Obstacles and difficulties present themselves to man's intentions; but he has reason given him that he may find out what is the best thing practicable, and do that; nay, reason has the power to compel the stubborn things of the world to her own ends, as fire converts all sorts of fuel to itself. A right purpose guided by right understanding cannot be really disappointed.<sup>2</sup> But this is hardly so important as the more contemplative aspect of the universal order, which is dwelt upon by Marcus Aurelius with striking force and frequency. The mind that learns to recognize a fixed order and connexion in the changing appearances of the world also learns to take a certain intellectual pleasure in that order considered in itself, apart from the pleasurable or useful character of its operations in their particular effects. Everything has a fitness in its own place, and almost everything may thus be a source of contemplative pleasure to him

<sup>1</sup> Marcus Aurelius, VII. 55. References hereafter given without an author's name are to the book and section of his work.

<sup>2</sup> IV. 1; VII. 68; VIII. 32, 35; X. 31, 33. In an extreme case the general Stoic doctrine allowed the final way of escape (*ἡσχίστη ἄγνοια*) by suicide. But M. Aurelius, though he nowhere controverts this, seems to hold that there is no case in which there is not something satisfactory to be done.



“ who has become truly familiar with nature and her works.”<sup>1</sup>

Again, all things are ever changing and passing away ; one comes in another’s place and no single thing endures. Perpetual change and renewal is the first law of nature, and everything is in a manner but the seed of that which shall be made of it ;<sup>2</sup> existence is a river in constant flow, a torrent sweeping everything before it ; the operations of all forces consist in manifold and unceasing change,<sup>3</sup> and this change is indeed the very condition of the being and perfection of all finite creatures.<sup>4</sup> Every part of the world is mutable and subject to decay ; but these things are so in order that the world, thus made up of ever perishing parts, may itself be ever the same and ever young.<sup>5</sup> But man is himself part of the universal scheme, and his specific character as man, although it is distinct and important (and by no one has its distinctness and importance been more dwelt upon than by the Stoics), is in the last resort determined by the conditions of the universal order. We may therefore think of ourselves as belonging to the whole order of the world and bring ourselves into a certain sympathy with it. And this habit of thought will help us to lift ourselves

<sup>1</sup> III. 2 ; a remarkable passage, which seems to place the contentment of the scientific mind on grounds independent of the ordinary Stoic teleology.

<sup>2</sup> IV. 36 ; comp. VIII. 6.

<sup>3</sup> V. 23 ; IX. 29 ; *χειμάρρους ἢ τῶν ὄλων οὐσία πάντα φέρει.*

<sup>4</sup> VII. 18.

<sup>5</sup> VII. 25 ; XII. 23. Cp. Spinoza’s “ *facies totius universi, quae quamvis infinitis modis variet, manet tamen semper eadem* ” (*Ep.* 66, *ad fin.*)

above the common passions that vex us with surprise and discontent when events fall out so as to cross our individual desires. Nothing can befall us that is not in the nature of things capable of being understood and reckoned with, and it is our business to master circumstances by understanding them.<sup>1</sup> As for those things which it is not in the power of man to alter or avoid, we are to accept them as being part of that order in which we ourselves are a part, and in which all things, however wide asunder in seeming, are in truth conjoined, and work together for the whole.<sup>2</sup> “Consider the courses of the stars as one running the same course with them, and think constantly upon the changes of the elements into one another; for by the perception of these things the grossness of our life on earth is purged away:” “nothing is so fitted as this to beget highmindedness.”<sup>3</sup> Thus we are led to one of the features which is most prominently put forward by the Stoics, at any rate by Marcus Aurelius, in setting forth the ethical ideal. Not only does the fruit of skill and understanding belong to the mind that knows the beginning and end of things, and the reason that pervades and rules all existence;<sup>4</sup> not only does the wise man acquiesce in the decrees of the universal order, knowing that they cannot be otherwise; he meets events with a contented and cheerful assurance, and his maxim is “to welcome everything that happens.”<sup>5</sup> Whatever comes to us, however

<sup>1</sup> VII. 47, 68; VIII. 15; comp. XII. 10, 18.

<sup>2</sup> IV. 40; VI. 36, 38; VII. 9.      <sup>3</sup> VII. 47; X. 11.      <sup>4</sup> V. 32.

<sup>5</sup> ἀσπάξασθαι τὰ συμβαίνοντα or πᾶν τὸ συμβαῖνον, III. 16; IV. 33; and many other places.

hard it may seem, is *prescribed* by nature, and is no less for the health of the whole than the remedies prescribed by a physician are for the health of the patient. If we repine at anything that happens in the course of nature, we are striving, so far as in us lies, to maim the perfection and unity of the world.<sup>1</sup> So that the rightly instructed man will say to Nature, the giver and taker of all things: "Give what thou wilt: take what thou wilt."<sup>2</sup> Epictetus bade his hearers never to say that they had *lost* anything, but that they had *returned* it.<sup>3</sup> And Marcus Aurelius, going far beyond simple resignation or acquiescence, lifts up his voice in a hymn of adoration (for one can hardly call it otherwise) which is among the most remarkable utterances of ancient philosophy.

Everything harmonizes with me which is harmonious to thee, O Universe. Nothing for me is too early or too late which is in due time for thee. Everything is fruit to me which thy seasons bring, O Nature; from thee are all things, in thee are all things, to thee all things return. The poet says, dear city of Cecrops; and wilt not thou say, dear city of Zeus?<sup>4</sup>

The last words bring out the speculative foundation of that cosmopolitan character which has always been remarked as prominent in the Stoic system. The Stoics shared, however, with other post-Aristotelian schools a strong cosmopolitan tendency, which is accounted for by the social and political circumstances of the time, and in particular by the decay of local independence, and therewith of the old Greek patriot-

<sup>1</sup> V. 8.<sup>2</sup> X. 14.<sup>3</sup> Epict., *Ench.* 11.<sup>4</sup> IV. 23 (Mr. Long's translation).

ism, coinciding with a great enlargement of commerce and intercourse between different parts of the world.

It is not my purpose to enter on the task of comparing Stoicism with modern philosophies. But one cannot help being struck by the resemblance of the line of speculation which I have just endeavoured to trace in M. Aurelius, and which seems to me to have been a very central one with the Stoics, to that which is struck out by Strauss in his latest work. English readers may find an even closer parallel to the Stoic nature-worship in a place where few, perhaps, would think of looking for it; I mean in Mr. Swinburne's *Songs before Sunrise*.

It will be observed that the mood of reverent acquiescence, or something more, with which a Stoic looked upon the order of the universe includes elements which do not seem to belong to a purely scientific contemplation. As yet we have not taken account of these, although the foregoing statement could not be kept clear of them. The Stoics had, indeed, the conception of natural order as a thing ascertained by experience, and worth knowing and making the best of simply because it is there and cannot be otherwise. But they sought to reinforce this idea by a creed of dogmatic pantheism with which their doctrine of the Kosmos was closely knit. And this pantheism was associated with, and to a large extent rested upon, a no less dogmatic teleology. Some, at least, of the Stoic leaders appear to have pushed their reflections on final causes into details which nowadays must appear ludicrous to every one.

I do not mean that these dogmas were adopted of set purpose ; existing habits of thought and language must have suggested them with almost irresistible force. “ Qui dit loi dit ordre ; qui dit ordre dit finalité : tous ces termes s’impliquent logiquement,” says a writer of our own day.<sup>1</sup> To a Greek all this was implied in the one word Kosmos, as M. Aurelius does not fail to note. The Stoics asserted that the world is a product of reason, and that all the laws of nature aim in the long run at reasonable ends. That which partakes less of reason exists for the sake of that which has a greater share of it ; so that, without saying exactly that the world was made for man, a Stoic might easily take an anthropomorphic, or rather anthropocentric view of it. Again, the earlier Stoics were not content with the uniformity of nature as an observed similarity of results in similar conditions, but by a strangely fantastic addition they imagined the conditions themselves as recurring on a vast scale. They held, in common with the Pythagoreans, that the world is periodically destroyed and regenerated. Internal evidence and tradition both tend to show that the Pythagoreans got this doctrine, together with that of the transmigration of souls, from India. It is true that the details of the Pythagorean teaching are not sufficiently known. But both doctrines are set forth at some length in mythical fashion by Plato ; the recurring cycles of the world’s life in the *Politicus*, the transmigration of souls in the *Phædrus*. And in both places, especially the latter, the points of like-

<sup>1</sup> M. E. Vacherot, in *Revue des deux Mondes*, Aug. 1, 1876, p. 503.

ness to Indian belief are almost too many to be accounted for by coincidence. Probably both Plato and the Stoics borrowed from the Pythagoreans, though M. Aurelius exhibits one curious coincidence in detail with the language of Hindú philosophy which suggests at least a possibility of later independent communications with the East.<sup>1</sup> Be this as it may, the Pythagoreans, followed by the Stoics, proceeded to better their instructors (whom they had perhaps misunderstood) by asserting that not only was the world to be destroyed and renewed when the perfect period of all things, or *annus magnus*, should be fulfilled, but that the former conditions were to be exactly reproduced, and the whole course of events repeat itself in the minutest details. (This is not only foreign to the Brahman cosmogony, but inconsistent with it.) The only modern parallel I can now call to mind is in a book of no special philosophical pretensions, entitled *Peter Simple*, where Mr. Muddle, the carpenter, assures the captain, with unconscious Stoicism, that he found the very same fault with him on that same quarter-deck 27,672 years ago. Among the later Stoics, Panætius and some others rejected this absurdity; but there is nothing to warrant the belief,

<sup>1</sup> "One is the sun's light, though dispersed by walls, mountains, and other things without number. One is the substance of all things, though dispersed in bodies without number, each of a determinate species [the term in the original, *ἰδίως ποῶν*, is a technical one]. One is reasonable mind (*νοερὰ ψυχῆ*), though it seems to be divided," XII. 30. The simile of the sun is a commonplace of Indian philosophic poetry, and may have become known to the Greeks. But the Stoic pantheism has in the main very little in common with that of the Hindús.

which one would be glad to entertain if one could, that Marcus Aurelius did so. He alludes to the doctrine several times without dissent, and with only such slight indications of doubt as to leave it possible that he may have thought the question an open one, but of no practical importance.<sup>1</sup>

Again, there is another quite distinct kind of reflection which is apt to be mixed up with the scientific notion of uniformity, and may even simulate it in expression. Moralists of almost every age and school have dwelt upon the common and monotonous character of human life as a reason for not setting one's heart on the usual objects of desire. "There is nothing new under the sun." This commonplace is certainly to be found in M. Aurelius,<sup>2</sup> and when he says that he who has seen the present has also seen the boundless past and future,<sup>3</sup> and speaks elsewhere to the like effect, he may mean only to repeat the

<sup>1</sup> V. 13, 32 ; VII. 19 ; IX. 28 ; X. 7 ; XI. 1. In VII. 19, *πόσους ἤδη ὁ αἰὼν Χρυσίππου, πόσους Ἐπικτήτους καταπέπωκε*, may only mean, as far as the words go, "How many *such as* Chrysippus and Epictetus have lived and died." So M. Barthélemy St. Hilaire takes it in his recent translation, which, however, has no pretension to exactness in detail. But it is too like the phrase, doubtless a regular one in the schools, in which the current figment has been preserved to us : *ἔσεσθαι πάλιν Σωκράτην καὶ Πλάτωνα καὶ ἕκαστον τῶν ἀνθρώπων κ. τ. λ.* Nemesius ap. Ritt. and Pr. 381. On the whole matter see Zeller's note, *Phil. der Griechen*, III. pt. i. 141. Assuming the material universe to be finite and to consist of indestructible atoms, and the course of nature to depend in the last analysis on the relative position of those atoms, and on that alone, the position at a given moment might well be conceived as sooner or later recurring ; and the cycle once set up would be perpetual. But there is no reason to believe that the Stoic dogma was founded on any such consideration.

<sup>2</sup> For example, IX. 14.

<sup>3</sup> VI. 37.

same thing; and very possibly the official teaching of Stoicism put it forward as a deduction from the idle fancy just noticed. Still one is tempted to think he had in his mind the greater conception of an order without assignable bounds in time or space, so complete and unbroken that from a perfect knowledge of the condition of the whole system at any given moment there might be deduced an accurate account of its condition at any time before or after. Certainly in another passage he seems to imagine a "reign of law," as we now say, both in the coexistence and in the succession of things. There is a rational connexion, he says, in the sequence of events; it is not like a mere enumeration of particulars in an arbitrary order.<sup>1</sup> M. Aurelius appears to affirm, again, that either there is no reason at all in the world (and for him, as a Stoic, reason and order are synonymous), or everything that happens must be the determinate result of an original and universal order: but the passage is far from clear.<sup>2</sup> It is worth noting that his conception of uniformity, whatever it was, applied no less to human affairs and conduct than to any other class of events.<sup>3</sup> This is no more than one would expect, as the Stoic philosophy is well known from other sources to have been wholly determinist.<sup>4</sup> The technical name for the necessity or universal law governing the world was *εἰμαρμένη*. "Fatum autem id

<sup>1</sup> IV. 45. Mr. Long gives "a necessary sequence" for τὸ κατηναγκασμένον. But in modern usage that is necessary which is the result of law; whereas the ἀνάγκη here contemplated is the opposite of law.

<sup>2</sup> VII. 75; see Mr. Long's note.

<sup>3</sup> VII. 49.

<sup>4</sup> See Zeller, *Phil. der Griechen*, III. pt. i., 144-155.



appello," says Cicero, abridging or paraphrasing, as it seems, from the Stoic Posidonius, "quod Graeci εἰμαρμένην, id est ordinem seriemque causarum cum causa causae nexa rem ex se gignat. Ea est ex omni aeternitate fluens veritas sempiterna. Quod cum ita sit, nihil est factum, quod non futurum fuerit, eodemque modo nihil est futurum, cuius non causas id ipsum efficientes natura contineat."<sup>1</sup>

It is remarkable that this general tone of cosmical and scientific contemplation did not bring the Stoics into conflict with the popular creed. This was one of the most striking points of opposition between their school and the Epicurean. Marcus Aurelius himself gave not only a decent but a zealous and lavish support to the observances of the State religion which his position required him to take part in. The supposition that he merely conformed in a spirit of philosophic indifference is not consistent with his acts, or with the effect they produced on spectators at the time. His masters not only offered no opposition to the rites and superstitions of the unlearned, but they found reasons in their philosophy to support them. Especially they defended the art and mystery of divination long after it had become the subject of doubt or open disbelief elsewhere; and they attempted to give their defence the appearance of a serious argument on scientific grounds. Their system forbade them to affirm special interferences with the course of nature, such as signs and wonders were commonly esteemed. The events foretold by omens and victims

<sup>1</sup> *De Div.*, I. 125.

were indeed, they said, unchangeable and determined from the first, as links in the chain of an eternal order. But the omens and victims were also links in the same order.<sup>1</sup> The fact of the connexion was abundantly established by experience ; and as for the part of the gods in the matter, they did not change the order of things, but knew the hidden causes and signs of events better than men, possessing as they did a higher intelligence. What could be more natural and reasonable than that they should be moved by goodwill to man to impart some of their knowledge to him ? Arguments were constructed exhibiting the truth of divination as a necessary deduction from the existence of gods :<sup>2</sup> and the prophecies of the soothsayer were represented as analogous to the scientific predictions of the astronomer. The Stoics had not invented the art of tying knots after a spiritual manner with the help of the fourth dimension of space ; but they would not have found much to learn in principle from the defenders of sundry pseudo-scientific positions in later days. On this point Panætius again stands out in honourable dissent ; he ventured (to the no small scandal of his colleagues) to cast doubt on the efficacy of divination.<sup>3</sup>

We have yet to remark the greatest speculative paradox of the Stoic philosophy. It exalted Reason as the source of the world's order, the one ruler and judge of all things, the sole fountain of good to every creature, and especially the sole origin and measure

<sup>1</sup> Cicero, *op. cit.*, I. 118.

<sup>2</sup> Cic., *op. cit.*, I. 82 ; II. 101.

<sup>3</sup> Cic., *op. cit.* I. 6. On the subject generally, Zeller, *Phil. der Gr.*, III. pt. i., 313, *seqq.*

of morality for man. And at the same time it was frankly, nay grossly materialist; no whit less so than the rival school of Epicurus, and probably more so than any modern school has been. The Stoics asserted in set terms that nothing really exists but matter, and that the soul is material (*σῶμα ἢ ψυχή*).<sup>1</sup> Even the world-soul, which they identified with Zeus or the supreme God, was regarded as a kind of finer matter endowed with special qualities of penetration and diffusion—the elemental fire as they sometimes called it. They would have hailed the luminiferous ether as an even more valuable contribution to theology than to physics. To give one concrete example of this materialism, Marcus Aurelius gravely notes and considers the question (not unlikely to have been a current one) how there can be room in the air for all the souls of the dead?<sup>2</sup> I am not aware that either the materialism or the superstition of the Stoics had any sensible effect on their moral doctrines or practice; but it was impossible to omit mention of these things, as the omission might have been misleading. It is likewise hardly possible to forbear noticing the signal example here given of the danger there is in affecting to hold either schools or particular men to what are called the logical consequences of their opinions. We hear a good deal nowadays of the mischievous tendencies of materialism and pantheism and their incompatibility with a high moral ideal;

<sup>1</sup> They described the intelligible or predicable relation (*λεκτὸν, κατηγορήματα*) between material things as immaterial (*ἀσώματον*).

<sup>2</sup> IV. 21.

and this not only from those who scatter materialism and pantheism as vague terms of abuse, but from men who have a distinct meaning for their words. In the philosophy of the Porch we find that, as a matter of fact, a most lofty and ideal morality—which indeed so much abhorred all weakness, compromise, and condescension, that it has been called even by a wise and generous historian harsh and impracticable—was associated with both pantheism and materialism in their crudest forms. We also hear a good deal of the absolute necessity of the doctrine of free-will (in one or another sense, for the champions are but ill agreed among themselves) for the support and the very existence of morality. Those who use such language surely forget that Marcus Aurelius, in common with all the moralists of his school, was an uncompromising determinist. It would seem that on the whole it is more or less unsafe to rely on any supposed necessary connexion between metaphysics and morals.

It is true that the Stoics conceived matter itself, or at least that which composed the finer elements, to be in its own nature active, so that their physics, as Zeller puts it, were dynamical rather than mechanical. And it may also be said that the contrast between materialism and idealism had not then been sharply defined as it is now. They may be said therefore, in a certain sense, not to have been pure materialists.<sup>1</sup> But the same may be said, for the same or other reasons, of most of the writers to whom the name is applied in modern times.

<sup>1</sup> Lange, *Gesch. des Materialismus*, I. 72, 2d ed.

The ethical theory of the Stoics can be understood only by keeping in mind its connexion with the general view of the world of which we have endeavoured to give some sketch. Taken by itself, the language of their fundamental maxims is exceedingly vague; and some well-known expositions of them, which are classical as literature but of secondary rank in philosophy, may be vague enough to justify the surprise and even contempt expressed by some modern writers. "Live according to Nature," is at first sight the most ambiguous of precepts. But the Stoics had a definite meaning for it, and were at some pains to explain it. They held, as we have seen, that everything is subject to one universal order, which is itself settled by, or rather is conceived as being, a supreme and all-pervading intelligence. This order being determinate and irresistible, every agent and event in some way or other fulfils it. Even those who think to hinder it are against their own conceit working for it, and we may say of them "Of these too the world had need."<sup>1</sup> On this ground there is obviously no foundation for ethical distinctions. But when we so far quit this universal point of view as to consider any particular species in relation to the whole, we see that it has certain constant relations to the rest of the world, which in fact determine its specific character, and which in the case of living creatures the life of the species is occupied in maintaining. Every creature has some normal function as part of the general order of the Kosmos;<sup>2</sup> what those functions

<sup>1</sup> VI. 42.

<sup>2</sup> ἔκτιστον πρὸς τι γέγονεν, VIII. 19.

are for each kind is to be ascertained by experience. They must always include, however, the preservation of the species; otherwise it could not exist as a species: thus the impulse of self-preservation, which the Stoics ascribed to every creature as the first spring of action, is not only common, as a matter of fact, to all active beings, but is an integral part of the common order of the world. Every act of an individual which belongs to the proper function of its species as thus understood is, in the Stoic language, *according to Nature* as regards that species—that is, according to its specific nature (*ιδία φύσις*); and inasmuch as it is an instance of the general law which fixes the normal place and action of the species in the great concert of the Kosmos, it is also said to be in an eminent manner *according to Nature*, taken in the general sense as the universal order (*κοινή φύσις*). Now man, as well as other creatures, has his specific function, or *nature* in the Stoic sense, as part of the cosmical plan. But, unlike other creatures, he can fulfil it with conscious intelligence and choice. He may know his station in the world, and know also that in maintaining it he is fulfilling the purpose of the supreme Reason. By the very fact of being addressed to an understanding agent the command “Live according to Nature” becomes “Live according to Reason.” This reason, as expressed in the constitution of man and his relations to the world, his capacities, his achievements, and his aspirations, furnishes a type or pattern of life which may be sufficiently known by those who choose to model

their conduct upon it. Actions conformable to this type are morally right, and rightmindedness is the conscious striving to attain it (we neglect for the moment the minuter points of Stoic doctrine); it is in this sense that moral goodness is the fulfilment of man's proper nature. The architect or the physician has his proper art, which, if he is competent in it, he conducts according to fixed principles; but every man, simply as a man, is in the same case;<sup>1</sup> and man, like every other creature, is judged by his fitness for the work for which he is destined.<sup>2</sup> "What is your business in the world? To be *good*."<sup>3</sup> This then is the calling imposed upon man by the supreme Reason; a fact to be observed which implies a law to be obeyed. Righteousness consists in fulfilling the duties imposed by it with a cheerful obedience of discipline.<sup>4</sup>

Some points must be noted here in which the Stoics differed much from the moralists of later times, not so much in their solution of ethical problems as in their conception of the problems themselves and of the province of ethics as a science. A modern reader is tempted to ask where is the *sanction* in the Stoic scheme of morality? How does it answer the question which some regard as the very first that moral philosophy is bound to answer—why should I do right? It may seem strange to us, but so it is, that the Greek philosophers, and especially the Stoics,

<sup>1</sup> VI. 35.<sup>2</sup> VI. 16.<sup>3</sup> XI. 5.

<sup>4</sup> The disobedient and dissatisfied are compared to runaway slaves, X. 25, and more oddly to a pig that kicks and squeaks when it is sacrificed, X. 28. Modern readers may be inclined to agree with the pig.

troubled themselves very little to find a direct reply. The question seems hardly to have occurred to them in that form ; they rather assumed that a doctrine of ethics is addressed to learners who are in the main willing to be taught, and it is far from certain that they were wrong in so doing. It may be fairly doubted whether it is the business of moral philosophy to establish the existence of its own subject-matter. There is no topic on which one may not bring argument to a standstill by pushing obstinate denial far enough. It may be that a man who will not admit that there is such a thing as moral duty thereby removes himself out of the reach of philosophy, and is amenable (supposing his opinion to be sincerely held and acted upon) only to other kinds of discipline. After all, the modern way of supporting the moral law with sanctions only puts the difficulty back ; for what if a perverse man should say, I do not care for your sanction ? We know that the most stringent sanctions have in fact been deliberately set at defiance on several occasions. All visible terrors of this world, all imaginable terrors of another, have failed to restrain men who fully knew or believed them from following the impulse of their passions. Do we say, then, that sanctions are of no account ? Certainly not ; their part in a historical inquiry concerning the growth of morality, or in the consideration of the state of morals existing at any given time and place, is of the utmost importance ; but this belongs to the practical side of the matter, and does not show that duty can be exhibited by way of demonstration to any



recalcitrant individual. As a matter of pure logic, you cannot demonstrate a categorical imperative. Mr. A. J. Balfour has well pointed out that no amount of reasoning can end in a command, much less a command sure to be obeyed. But to return to the Stoics: whether it was a real omission or not, they did not consider the groundwork of ethics in this light. In Marcus Aurelius there is very little about the consequences of right or wrong actions to the individual agent. It is worth mentioning, however, that in one passage of Epictetus we find a clear enough expression of what is now called the sanction of self-esteem.<sup>1</sup> He distinctly says that we are to weigh against the enjoyment of a present pleasure, on the one hand the future pain of repentance and self-reproach, on the other hand the future pleasure of a satisfied conscience. And the Stoics asserted no less stoutly than any one else, even the Epicureans, that virtue is the only true happiness, though they denied that virtue is morally preferable *because* it gives happiness. Even this, however, is not prominent in Marcus Aurelius; and it is needless to repeat here that the Stoics required virtue to be above all things disinterested. One instance may be given: "When thou hast done a good act and another has received it, why dost thou still look for a third thing besides these, as fools do, either to have the reputation of having done a good act or to obtain a return."<sup>2</sup> Of the optimism of their ethics we must say a word more presently.

<sup>1</sup> Epict. *Ench.* 34.

<sup>2</sup> VII. 73 (Mr. Long's translation); and see IX. 42, cited below.

Now this assumption, which I think is tacitly made all through the Stoic teaching—namely, that there is such a thing as a rule of right conduct binding one man as well as another, and that the average man, so far, at any rate, as philosophy has to deal with him, is willing to follow that rule if it is properly explained to him—brings us almost at once to the famous Socratic position, that *virtue can be taught*; or obversely, that vice is mere ignorance. If (among the nations which have produced philosophers at all events) men were not on the whole able and willing to do right oftener than not, it is difficult to see how moral philosophy would be possible. In so far as a man is able and willing to do right, he can do wrong only by mistake or misapprehension; and it is readily perceived that much wrong has been and is done in the world for pure want of knowledge. The Stoics, dwelling exclusively upon this view, referred all wrongdoing to this head; and the doctrine had great practical importance in their school, as we see in Marcus Aurelius, as an argument for patience and equanimity in bearing misbehaviour at the hands of one's fellow-men. Reflect, he says in substance, that it is the deed of your fellow and kinsman, not knowing the law of his own nature;<sup>1</sup> ask yourself what is his mistake;<sup>2</sup> his wrong is in truth involuntary;<sup>3</sup> it is the inevitable result of his erroneous notions as to what is good and desirable,<sup>4</sup> his mind being, as it were, jaundiced.<sup>5</sup> It is more than once added that rather than waste time in anger,

<sup>1</sup> III. 11.<sup>2</sup> V. 22; VII. 26.<sup>3</sup> VII. 22, 63; X. 30; XII. 12.<sup>4</sup> VIII. 14.<sup>5</sup> VI. 57.

you should teach him to know better.<sup>1</sup> Other reasons are also given in the same and other passages, but none so characteristic of the Stoic system. Once it is said, "It is proper to man to love even offenders."<sup>2</sup> Again, the immortal gods have to put up with worthless men through all time, and take it not amiss; how much more then shall you endure them for a little lifetime, being even such an one yourself?<sup>3</sup>

From this digression, which seemed needful by way of explanation, we go back to the positive conception of morality as held by the Stoics. Virtue does not, in their view, consist in action directed consciously to the attainment of some ulterior advantage, but in the normal and healthy exercise of an active function<sup>4</sup> belonging to the proper constitution of man as a species (*ἰδία φύσις*). The question then presents itself, what is this specific constitution? What are the characteristic qualities of man that make him a moral being? The answer, often and in many forms reiterated in the teaching and writing of the school, is that man is reasonable and social; there is no lack of other authorities on this point, but the constant occurrence of the topic in Marcus Aurelius is significant as confirming them. Here again it is to be observed how the Stoics made use of their cosmical and teleological ideas as a background for ethical theory. The world itself being

<sup>1</sup> X. 4; XI. 11; XI. 18 (in this last passage most of the precepts for such occasions are summed up). <sup>2</sup> VII. 22.

<sup>3</sup> VII. 70; compare with this the legend of Abraham and the fire-worshipper.

<sup>4</sup> The man of sound judgment perceives that his own good lies in his own activity (*ἰδίαν προῆξιν*), VI. 51.

conceived as rational, and man being the eminently rational creature, the agreement of man's *ιδία φύσις* with the *κοινή φύσις*, or general law of the universe, is presented with an air of self-evidence.<sup>1</sup> It is likewise assumed as axiomatic (so, at least, it appears in Marcus Aurelius) that the only rational life for man is a social life. When man consults his reason it clearly and imperatively bids him live with his fellow-men; human reason itself is constantly called social (*λόγος κοινωνικός*, sometimes *πολιτικός*). "He is a deserter who abandons the social reason. . . . he is a fragment torn from society who tears his own soul from the soul of reasonable creatures, which is one."<sup>2</sup> As will be seen by this last quotation, the pantheism of which we have already spoken is brought in to give a metaphysical reason for the social bond; the souls of men being conceived as pieces or quantities of the same stuff. Man is social, and is entitled to sociable treatment at the hands of his fellow-man because he is reasonable.<sup>3</sup> Each man is to the community as a member to an organism, not as a mere part to an aggregate;<sup>4</sup> so the man who commits an unsocial action is a mutilator of the body politic, in that he cuts himself off from it; but, as Marcus Aurelius or his original quaintly, yet finely, adds, the limbs of this body have the special gift of being able to reunite themselves to it.<sup>5</sup> Further, as a branch cut off from

<sup>1</sup> For the reasonable animal (man) action "according to nature" and "according to reason" are identical, VII. 11.

<sup>2</sup> IV. 29.

<sup>3</sup> VI. 23.

<sup>4</sup> VII. 13. There is an untranslatable pun on *μέλος* and *μέρος*.

<sup>5</sup> VIII. 34; XI. 8.

the next branch must needs be cut off from the whole tree, so a man at strife with his neighbour is cut off from the whole fellowship of men.<sup>1</sup> The whole of man's action is to be directed to social ends, and to the good of his fellow-men,<sup>2</sup> and such action, being the exercise of man's proper energy and the fulfilment of his truest nature, is its own sole and sufficient reward. Does the eye seek a recompense for seeing, or the feet for walking? Likewise the man who has done aught towards the common weal has done that which he is set in the world to do, and in doing it receives his own.<sup>3</sup> It is even said that every deed that does not bear directly or remotely on the chief end of the common welfare is of the nature of dissension and sedition.<sup>4</sup> One passage, in which the duty of sociableness is enforced, first by various supposed physical analogies in the elements, and then by the example of the gregarious and social animals, concludes with the remark that no man can be wholly unsocial even if he tries: nature is too strong.<sup>5</sup> It is said, too, that the ruling principle in man's constitution is that of society.<sup>6</sup> In all this there is, at the same time, a notable absence of any distinct reference to political activities and duties; the city from which all the older Greek ideas of religion and morality took their spring and strength has become expanded to the bounds of the inhabited world, and man owes duties to his neighbour, not as his fellow-citizen, but as his fellow-man. For the *πολιτικὸν ζῶον* of Aristotle the teachers of Marcus Aurelius

<sup>1</sup> XI. 8.<sup>2</sup> VII. 5; IX. 23.<sup>3</sup> IX. 42.<sup>4</sup> IX. 23<sup>5</sup> IX. 9.<sup>6</sup> VII. 55.

had substituted *κοινωνικόν*. This is, indeed, one of the most familiar marks of the post-Aristotelian philosophy in general. In some ways the cosmopolitan turn of ethical conceptions was a real advance, though both its origin and its development exhibit clear signs of weakness. But in considering the effect of Stoicism on the Roman world, it is proper to bear in mind that the feeble side of its cosmopolitan doctrine was just that to which a Roman disciple, accustomed to take part in affairs of state, would be likely to bring sufficient correction from his own resources. A Roman commander or administrator guarding the frontiers of the Empire against fierce and barbarous tribes could never be a mere citizen of the world; and it is not insignificant that we find Marcus Aurelius, who was himself thus engaged during part of the time that he set down his notes, more than once giving a marked place in his reflections to his duties as the first of Roman citizens. "Being Antoninus, I have Rome to my city and country; being a man, the world. The weal, then, of these cities, is the sole measure of good for me."<sup>1</sup> Before passing on we may note that the connexion between the social morality of Stoicism and its cosmical theory is well given in a single sentence by Cicero: "They (the Stoics) are of opinion that the world is governed by the power of the gods, and is in a manner a common city and polity of men and gods; of which world each one of us is a member. Whence this follows in course of nature, that we set the common weal before our own."<sup>2</sup>

<sup>1</sup> VI. 44.

<sup>2</sup> Cic., *De Fin.*, III. 64.

The next question may seem to be of this kind: All this being so, how did the Stoic morality provide for dealing with the problems of conduct that arise in actual life? The foundations of the work being thus laid, by what rule were the details assigned? And if it is indeed a material part of the business of moral philosophy to tell people what is right and wrong in given circumstances, there is no doubt that Stoicism must be found sadly wanting. There is very little in Marcus Aurelius that could be used to throw any direct light on particular cases of conscience. But there is another view of the office of moral philosophy not wholly without supporters, which is that this task is exactly what moral philosophy should not attempt. According to this opinion the office of ethical science, so far as it has a practical bearing on conduct, is not to solve special problems, but to form a habit of mind fit to solve them in action. The object is to impart not bare precepts, but moral habits which may bear the good fruit of right intention guided by trained judgment; not to teach men what actions are right, but to make them rightminded. A healthy moral constitution may be trusted to deal with the particular cases as they arise. You cannot make yourself righteous by working out a set of fixed rules; on the contrary, when you want to know how to apply the rule in a new instance you must take the judgment of the righteous man. This conception, more familiar perhaps to the Greeks than to most of ourselves, is often present in Aristotle, and there are indications, at least, in Marcus Aurelius that it was practically

adopted by the Stoics. We find the healthy moral sense expressly compared to the healthy sight or taste of bodily sense.<sup>1</sup> It is well known that the ideal *wise man* of the school was conceived as infallible in his moral judgment; this, however, proves nothing as to the supposed character of the process of judgment itself. But I do not think the process is anywhere represented as one of calculation from rules, save so far as an accurate knowledge of the circumstances and consequences is dwelt upon as necessary to right action; and this last has to do with the conditions of the problem rather than with the actual solution. Neither is the self-sufficient and necessary rightness of the Wise Man's conduct, as conceived by the Stoics, a mere paradox. The highest morality of all times has regarded obedience to precepts as but the rudimentary and subordinate part of righteousness. The state which the soul eager for righteousness endeavours to attain is that of being a law to itself; and therefore Dante makes Virgil declare to him, after he has passed through Purgatory, that, being purified of sin and error, he is his own priest and king. There are no greater words than these in all modern poetry:—

Non aspettar mio dir più, nè mio cenno;  
 Libero, dritto, sano è tuo arbitrio,  
 E fallo fora non fare a suo senno;  
 Perch' io te sopra te corono e mitrio.

It is true that some of the Stoics appear to have committed themselves to what is now called casuistry, and not to have escaped the kind of odium which has

<sup>1</sup> X. 35.



become attached to the like inquiries in later times. And certainly some of their results, as handed down to us (if we could be sure that they are fairly represented), are not altogether edifying. But the displeasure they gave was due in great measure to their adopting from the Cynics an open and offensive disregard of men's common feelings. There was an original connexion between the Stoic and the Cynic schools, and though the Cynic elements of the Stoic doctrines were gradually thrust into the background, or explained away by the more enlightened leaders, yet there was always a Cynic wing, as we might now say, of the Stoics, and Cynical propositions held their ground as commonplaces long after they had ceased to be consistent with the developed and active social morality of the school. We find several times in M. Aurelius a vein of coarse and exaggerated depreciation of all ordinary objects of desire, where the argument, such as it is, consists in exhibiting them as resolved into elements which are separately worthless or disgusting.<sup>1</sup> These passages can be accounted for, I think, only as a residue of Cynic traditions. They have no real affinity with the lofty cosmical disdain with which, as has already been seen, the Stoics endeavoured to look down upon the slight and mutable things of this world, but which is consistent with an earnest purpose of doing the best one can, however little it may be, and not despising one's work for not

<sup>1</sup> VI. 13; VIII. 24, 37; IX. 36; XI. 2. M. Barthélemy St. Hilaire's phrase, "crudité étonnante," is not at all too strong.

being greater,<sup>1</sup> and which sought contentment not in violent self-deceptions, but in an even mind. It is no Cynical prompting that bids men pray, not for the objects of desire, but for a soul free from desire.<sup>2</sup> Developed Stoicism is equally remote from the crudity of the Cynics on the one hand, and from asceticism on the other. Man's physical well-being (*ἡ ὡς ζώου φύσις*) is not to be suppressed, but rather cultivated, in subjection however to the demands of his reasonable and social well-being (*ἡ ὡς ζώου λογικοῦ φύσις, τὸ λογικὸν καὶ πολιτικόν*).<sup>3</sup>

The Stoic optimism and its curious consequences are perhaps the most generally known parts of the system. The Stoics, holding that the universe was governed by immutable law, which law was the expression of perfect reason and the pattern of all good, were necessarily optimists. They looked upon the universe as good in a human and ethical sense, and the Wise Man was the purposed crown and glory of creatures. And they had accordingly to face the question which every scheme of benevolent teleology has to face in some way—namely, Why do good men suffer evil in the world? The answer they gave deserves admiration for its boldness. They simply denied the fact. They said that the supposed evils are not evils at all; the common objects of desire or aversion, in so far as they do not involve ethical merit

<sup>1</sup> Compare IX. 28 with the following section.

<sup>2</sup> IX. 40.

<sup>3</sup> X. 2. The Cynics, it has been well remarked, were not *ascetics*; for they sought not to mortify desires, but to reduce them to the least number, and satisfy them in the cheapest and coarsest way.

or demerit in the person enjoying or suffering, are neither good nor bad, but indifferent. This is the celebrated doctrine of *Adiaphoria*, which the Stoics maintained against all comers with great zeal and pertinacity; yet they had to admit that for practical purposes there must be such a thing as a rational *preference* among these *indifferent* things, if only because the Wise Man must needs make some choice among them; and they saved a contradiction in terms by ingenious distinctions and refinements, on the particulars of which we need not enter here. The line of thought by which the main doctrine was reached is no matter of conjecture: it is distinctly given, for instance, by M. Aurelius, when he says that nothing can be really good or bad which befalls good and bad men alike.<sup>1</sup> The topic was considered by the Stoics as one of importance on account of its practical value in strengthening the mind against the common temptations of the world, and the deliberate cultivation of *Adiaphoria*, the attitude of pure indifference towards the whole contents of the neutral field, "between virtue and vice," was recommended as a point of moral discipline.<sup>2</sup> The same optimism led in much the same way to the well-known Stoic paradoxes concerning the blessed state of the Wise Man. Since no real harm can befall the man who possesses true wisdom and virtue (it will be remembered that with the Stoics these were synonymous), and he who does not possess them possesses no real good, it follows that the wise man alone is entitled to all the honourable

<sup>1</sup> IV. 39.

<sup>2</sup> VII. 31.

additions which men are accustomed to bestow indiscriminately; to him alone belong freedom, wealth, and kingship—even personal beauty was not omitted from the catalogue.<sup>1</sup>

These and kindred propositions were not taken by the Stoics in the way of rhetoric or metaphor; we are told, indeed, that the school was averse to rhetorical expansion. They were seriously maintained as literal truth, and defended with the utmost rigour of dialectic.<sup>2</sup> Still, it is difficult to believe that Stoic teachers always resisted their capacities for rhetorical treatment. Cicero has left us some specimens in this kind, and in particular a little book entitled *Paradoxes*, where he sets forth the Stoic maxims in a popular manner. It may be convenient to give the heads—they are as follows: 1. Moral good [*τὸ καλόν*, *honestum*] is the only good. 2. Virtue suffices for happiness. 3. There are no degrees of wrongness or rightness in actions. 4. Every fool [= *not-wise* in the Stoic sense] is mad. 5. The wise man alone is free, and every fool is a slave. 6. The wise man alone is rich.

Outsiders naturally found here a tempting field for ridicule, and were not slow to make the most of it. Serious argument was not so easy as it might seem at

<sup>1</sup> See, for example, Cic., *De Fin.*, III. 75; Hor., *Ep.*, I. i. 106; *Sat.*, II. iii. 45 (the whole Satire is an illustration of the paradox, *πᾶς ἀφρονὸν μαίνεται*, No. 4 in Cicero's list).

<sup>2</sup> Cato autem, perfectus mea sententia Stoicus . . . in ea est haeresi quae nullum sequitur florem orationis neque dilatatur argumentum; minutis interrogatiunculis, quasi punctis quod proposuit efficit. —Cic. *Parad.*, Proem. Cicero speaks also of the school as cultivating *conclusiunculae*.

first sight, for the Stoic could meet any appeal to facts by explaining that there was not a real Wise Man to be found in the world. It was certain that there had been very few altogether, and it was an open question whether any one had come quite up to the mark in historical times. Socrates and one or two others were commonly admitted, and some of the Roman Stoics ventured to add Cato.<sup>1</sup> But here, again, they made a compromise with practical needs. Strictly speaking, one must either be in the perfect light of wisdom, or in an outer darkness wherein there were no degrees. A miss is a miss, they said, whether the shaft goes a hair's-breadth or a mile beside the mark. Yet they devised the notion of a certain *proficiency* towards real excellence, which might approximate indefinitely to it in its effects, though it could never be the same thing; a kind of ethical asymptote to the unattainable ideal. All this was likely enough to degenerate into quibbling and mere verbal puzzles,

<sup>1</sup> The singular parallel between wisdom in the Stoic philosophy and the state of grace in Augustinian theology is pointed out by Zeller (*op. cit.* 235). It extends even to the detail of the transition or *conversion* from utter darkness to perfect enlightenment being the work of a moment. It will be noted that the number of the elect is much more narrowly limited by Stoicism than by even the most rigid forms of Calvinism; there may not be a single *wise man* in many centuries. But then the consequences of exclusion were comparatively slight. There is a coincidence of a higher kind with Christian thought when Marcus Aurelius bids himself lead a new life from every moment, "as one that is dead, and whose past life is now finished," (VII. 56); "thou shalt be a new man and enter upon a new life" (X. 8). A not less striking parallel may be found in the Buddhist *Nirvāna*, if we regard it with Mr. Rhys Davids and other good authorities as a state of passionless perfection, theoretically attainable even in the present life.

especially under the influence of the fondness for the curiosities of dialectic which was characteristic of the school. The paradoxical and polemical aspects of the system acquired undue prominence in the eyes of critics and outside observers, and, I think, have retained it in modern times. It is remarkable that there is hardly a trace of them in Marcus Aurelius. So far as one can guess from his writing, Horace's jesting notice of Chrysippus's dictum that the Wise Man, if he chose, would be the best of cobblers, must have fallen quite harmless upon him. May we not suppose that the men who, like Marcus Aurelius, took up Stoicism not as a literary profession but as a guide to the conduct of active life were content to leave this kind of discussion alone, or even in their hearts despised it as mere verbal trifling?

It will readily be understood, but perhaps I should expressly repeat it, that the object of the foregoing pages is not to give an exposition of the Stoic system, such as it was, or may have been, officially set forth by the founders and masters of the school, but to trace the substance and connexion of the doctrines which appear to me to have contained its working power for Marcus Aurelius and those of whom he is the type. The history of Greek philosophy is a magnificent and weighty subject, which yet remains to be worthily treated by an Englishman. My present endeavour is not only within narrow bounds in extent, but altogether in a narrower sphere. But no inquiry can be worthless which may throw any light upon the character and moral training of the men

whose arts and arms, maintained by Roman energy, and touched with the fire of Greek intellect, established the empire and the peace of Rome, and created the civilized world.

NOTE.—I may add a word here about editions of Marcus Aurelius. No author wants a commentary more, but Marcus Aurelius has been strangely neglected in this respect. There is, I believe, no annotated edition later than Gataker's, which dates from the middle of the seventeenth century. The text is often difficult, or corrupt, or both; the condition of some places is probably hopeless. Besides other scholars, Coraës and Schultz have done good work upon it, but much yet remains to do. The Tauchnitz reprint of Schultz's text (which is practically the only available edition for ordinary purposes) has critical notes, but the absence of all discriminating marks in the text itself is a drawback. A field of no small interest and opportunities is open to any scholar who will equip himself, in addition to general critical training, with a competent knowledge of the vocabulary of the post-Aristotelian schools. I will give one example. In VI. 38 we read as follows—*τρόπον γάρ τινα πάντα ἀλλήλοις ἐπιπέλεκται, καὶ πάντα κατὰ τοῦτο φίλα ἀλλήλοις ἐστί· καὶ γὰρ ἄλλῳ ἄλλο ἐξῆς ἐστι· τοῦτο δὲ διὰ τὴν τοικὴν [vulg. τοπικὴν] †κίνησιν καὶ σύμπνοιαν, καὶ τὴν ἔνωσιν τῆς οὐσίας.* Schultz rightly prefers *τοικὴν*, the reading of the Vatican codex, and notes *κίνησιν* as corrupt. He proposes *σύννησιν* or the like. Another suggestion is *κοίνωσιν*. But I think we need have little doubt in replacing *κίνησιν*, for *τοικὴ κίνησις* was a regular Stoic term, Zeller, *op. cit.* 189, note. *τόνος* was the vivifying action of the elemental fire pervading the world, see Stobæus *ap. Ritter and Preller*, p. 379.

For English readers the want of a commentary is, to a considerable extent, supplied by Mr. Long's excellent translation; not altogether, for I think, with all deference to the taste of a master in criticism, that the Greek has, if not exactly a charm, yet enough of a "distinct physiognomy" to keep one from leaving it on the shelf. One can only regret that Mr. Long's notes are so few and brief.

## XIII.

MR. SPENCER'S DATA OF ETHICS.<sup>1</sup>

FEW readers will think that an apology is needed for the appearance of a volume on Ethics by Mr. Spencer in an order which is premature as regards the scheme of a system of philosophy which he has spent so many years in working out. Like other philosophers who have undertaken elaborate and far-reaching constructions, Mr. Spencer has from the beginning had, as he now tells us, an ultimate ethical purpose running all through his work. Doubting—for reasons which all students of philosophy must regret—whether it be possible for him to carry out his scheme in its order as first planned, he has thought it the safer course to make sure to some extent of that part to which all the rest is intended to lead up. In so doing he will have the intellectual as well as the personal sympathy of those who have followed his work thus far; for there can be no doubt that it is the ethical side of the problems of philosophy which excites the widest and deepest interest. One might indeed lay it down as a rule subject to few exceptions that,

<sup>1</sup> *The Data of Ethics.* By Herbert Spencer. London: Williams and Norgate. 1879.



whenever a question appearing to be purely philosophical is the subject of particularly keen discussion, an ethical question will be found underlying it. Through its ethical interest philosophy is linked with our actual life, and establishes a practical claim on our attention.

It is by no means an uncommon belief that a system of ethics resting on either theological or philosophical foundations is needful for the security of practical morality. And this belief, though not exactly in its commonest form, is adopted by Mr. Herbert Spencer, who affirms that "the establishment of rules of right conduct on a scientific basis is a pressing need." We cannot help thinking this statement too broad and positive. It seems to imply that nations are made moral by systems of ethics; whereas people make ethical systems (as we submit) because they are already moral. A theory of ethics is an attempt, which may or may not be successful, to make explicit that which is implicit in practical morality. Its failure, if it fails, does not affect the worth of practical morality or ordinary men's conviction of it. The scientific basis of working morals is not in any formulated rules or propositions, but in the mass of continuous experience half-consciously or unconsciously accumulated and embodied in the morality of common sense. Any one who thought so ill of the morality of common sense, the sum of current moral rules and feelings by which ordinary well-conducted men govern themselves, as to be utterly dissatisfied with it and want to get rid of it, would naturally enough go in

quest of a new scientific basis. But this is not at all Mr. Herbert Spencer's position; and his opinion as to the necessity of putting ethics on a new scientific footing seems to mix up to some extent the theoretical explanation of moral rules with the grounds on which men in ordinary life obey them. Notwithstanding Mr. Spencer's emphatic language, and notwithstanding also that of moral alarmists who cry out in far other interests and for far other purposes about the dangers of ethical speculation, we think it prudent and right to bring to the consideration of ethical theories just the same disinterested curiosity that we bring to any other philosophical discussion.

What Mr. Spencer understands by ethics is a scientific account of right and wrong conduct; where by conduct is meant the sum of all acts consciously adjusted to ends. We say consciously—an addition to Mr. Spencer's own phrase which appears to be in strictness required, although it is true that the distinction between conscious and unconscious adjustment does not arise till we consider organisms of a fairly advanced type. Adopting the general theory of evolution, we must expect to find the process of evolution manifested in conduct, as in all other phenomena of life; and in fact we shall find that according as that process has been carried farther or less far in the general development of a given organism, the adjustment of acts to ends is more or less various and complete. The more highly evolved conduct is the more successful conduct. But in order to compare the conduct of different living beings in

respect of success we must have the idea of a common ultimate end which is aimed at by their actions as a whole. A ruined man who jumps into deep water with the intention of drowning himself, and is drowned accordingly, is successful as regards his immediate purpose, but is not called successful in a general way. The end to which the actions of living creatures as a whole tend to be adjusted is the maintenance of life. In measuring the perfection of the adjustment, or the degree of evolution of conduct, we have to take into account the quality as well as the duration of life which is attained ; an oyster may live more days than a cuttle-fish, but for the cuttle-fish a day contains fuller and more various life than for the oyster. Further, the adjustment has to be race-maintaining as well as self-maintaining ; and development, as a rule, proceeds under both these aspects at once, the self-preservation of the individual and that of the race working into one another. And this, Mr. Spencer adds, is not all ; the evolution of conduct includes those modifications of it which enable adjustments to be made by one creature without interfering with the adjustments of others. In other words, the tendency of development in conduct is to reduce as far as possible the dependence of the agent on a struggle for existence with other creatures. In social life this line of determination passes from the negative phase of non-interference to the positive one of co-operation. Here Mr. Spencer assumes, if we rightly understand him, that increase of "the totality of life," not merely with regard to a given individual or race, but when

we take the whole sum of life in the world, is a measure of the progress which the evolution of conduct has made. And when we remember that our divisions of species and races are in the last resort artificial, this may not appear illegitimate.

Thus far the notions of good and bad have not been introduced. Mr. Spencer now proceeds to examine them, and finds that we call things good or bad in common speech in so far as they are well or ill adapted to some known or assumed end. And we can pass from purely non-ethical to purely ethical judgments by almost insensible gradations, this *final* character (if we may so call it) of the epithets good and bad, or right and wrong, persisting all through. A good knife is a knife that will cut; the right key is that which opens the lock. Here we are quite off ethical ground. It is good to eat wholesome food in due season; it is wrong to act rashly in important business; here the judgment is of a semi-moral kind. At the other end of the scale we have abstract moral propositions, such as that it is right to deal fairly with all men, or that pride is a bad passion, in which the reference to an end aimed at by human conduct as a whole is so generalized and faint that it easily escapes notice. But an end is, in truth, always referred to—namely, the completeness of human life. This naturally raises the question—completeness with reference to what? For it must not at this stage be assumed, nor does Mr. Spencer assume, that the desirableness or moral excellence of life is to be measured by the natural history scale of development. The naturalist

calls this animal *higher* and that *lower*, and can give a scientific explanation of those terms. But whether the *higher* animal is always the *better*, and if so, in what sense, is the very question to be cleared up. Thus we have still to seek the definition of *good* and *bad* on the largest scale. Life is good if well adjusted; bad if ill adjusted—to what? Mr. Spencer, thus confronted with the venerable question of the *summum bonum*, ingeniously attacks it by a turning movement. The controversy between optimists and pessimists, which happens just now to be prominent, will show what mankind really value in life. Is there anything which the pessimist denies of life and the optimist affirms, and of which they both admit that its presence or absence is conclusive? “Yes,” says Mr. Spencer, “there is one postulate in which pessimists and optimists agree. Both their arguments assume it to be self-evident that life is good or bad according as it does or does not bring a surplus of agreeable feeling. The pessimist says he condemns life because it results in more pain than pleasure. The optimist defends life in the belief that it brings more pleasure than pain. Each makes the kind of sentiency which accompanies life the test.” In other words, all men are at bottom hedonists; “pleasure somewhere is the tacitly implied ultimate end” on any view of life; and “if we call good the conduct conducive to life, we can do so only with the implication that it is conducive to a surplus of pleasures over pains.” An intuitionist’s natural reply will be that the end and standard of moral conduct is not necessarily that which

all men in fact desire. That pleasure is desired by all men does not prove it solely or supremely desirable in an ethical sense. But the objection is of minor importance as against Mr. Spencer, as we presently find. For with Mr. Spencer hedonism is not a "method of ethics" at all, but a psychological fact. Again, the ultimate coincidence of the maximum of pleasurable feeling with the highest phase of evolution is, in his view, capable of proof; but neither of these is to be made an object of direct pursuit in the conduct of life. Mr. Spencer's "method of ethics," so far as yet disclosed, appears to be much less summary and infallible than most that have been propounded by former philosophers; which, as we need hardly say, is to the scientific reader a strong point in its favour. Meanwhile he affirms that the judgment of moral common sense as to the goodness of conduct coincides with the judgment of natural history as to the degree of its evolution. "Other things equal, well-adjusted self-conserving acts we call good; other things equal, we call good the acts that are well adjusted for bringing up progeny capable of complete living; and, other things equal, we ascribe goodness to acts which further the complete living of others." It is not explained whether or how far the "others" of the last clause extends for practical purposes beyond others of our own kind.

Mr. Spencer does not so distinctly break with old-fashioned utilitarianism as some of his readers may have hoped or expected. His own account of the difference is that he aims at a rational, not an empirical, utilitarianism. It is not enough to ascertain

that in fact certain kinds of conduct produce happiness and others produce misery; the function of morality as a science is "to determine *how* and *why* certain modes of conduct are detrimental, and certain other modes beneficial." Scientific propositions about conduct are to be deduced "from the laws of life and the conditions of existence." Here we agree with Mr. Spencer in principle, though we are not prepared to admit that the utilitarianism of J. S. Mill, or even of Bentham, is so merely empirical as his criticism assumes. We may add that the ascertainment of the sorts of conduct which promote the welfare of society or the contrary is just what the common experience of mankind has been doing for all the time that men have lived together. There is no occasion for moral philosophers to do it over again, and no reason to suppose that they would do it better. The collection of moral axioms arrived at by experience may be a useful undertaking, but it is not ethical science. On the other hand, the deduction of an ethical system from the fundamental principles of human nature is not a thing unattempted. In particular, it was undertaken two centuries ago by Spinoza, no doubt with materials to some extent imperfect; and his work has, on the whole, steadily risen in the esteem of competent persons. Even hostile critics have scarcely disputed the value of his theory of the passions. And at a much earlier time the Stoics (whom Mr. Spencer once or twice mentions in a rather slighting way and not quite accurately, we presume on the strength of second-hand accounts)

had made good a sensible progress in the same direction.

It is worth considering whether Mr. Spencer's treatment of pleasure is not the true point of difference between his doctrine and most previous forms of hedonism. Instead of taking pleasure and pain as ultimate facts, and defining welfare in terms of pleasure, Mr. Spencer explains pleasure as the general form of feeling which, on the whole and in the long run, is correlated with actions conducive to the welfare of the organism ; where *welfare* is equivalent to conversation or maintenance. That "every pleasure increases vitality ; every pain decreases vitality"—is not only a physiological fact, but a necessary condition of life going on. If pleasure-giving acts were not in the main life-sustaining acts, sentient life could not sustain itself at all. Pleasure, the good in immediate feeling, is the index of preservation or welfare, the good in the history of the individual and the race as it would appear to a scientific observer. Of course the felicific quality of pleasure (to use Mr. Sidgwick's word) is subject to apparent exceptions, though it is at least arguable, and has been ingeniously argued by Mr. Grant Allen, that pleasure, as such, is always to some extent good for the organism. At first sight Mr. Spencer may possibly be accused of arguing in a circle. He seems to say that life is good because it tends to a surplus of pleasurable feeling, and then that pleasure is good because it makes for a complete life. But his real position, we conceive, is something as follows :—The pleasurable or good in feeling is, as



feeling, ultimate, and no justification of our desiring it either is or can be given. To show that pleasure is desirable would be an irrational and idle task. But we can tell what pleasure is and why we desire it, since the equivalence in the long run of pleasure-giving and life-sustaining acts is involved in the conditions of life. The process of evolution in living things is the maintenance and adjustment of life, and pleasure is the consciousness of increased life. Thus the goal of evolution and the goal of hedonism are one; and if we could set up an ideal of evolution as somehow desirable in and for itself (to which eager disciples of Mr. Spencer and Mr. Darwin have now and then been tempted) it would make no practical difference.

Mr. Spencer proceeds to trace the evolution of conduct under its various aspects, including in the psychological aspect the origin and nature of the moral sense. The criticism of adverse schools will probably say that these chapters, however interesting and ingenious, are not morality, but natural history. Certainly they are not the kind of moral science that intuitionists demand; but then Mr. Spencer does not profess to furnish us with a transcendental system of ethics. Those who are content with a scientific analysis of moral phenomena in terms of human experience may fairly call on the transcendentalists to produce something better and more complete themselves. Transcendentalists, on the other hand, may perhaps welcome Mr. Spencer's criticism on the hitherto current methods of utilitarianism, which is unsparing. The direct pursuit of happiness is alto-

gether rejected as a guide for conduct. Rational utilitarianism "does not take welfare for its immediate object of pursuit, but takes for its immediate object of pursuit conformity to certain principles which, in the nature of things, causally determine welfare;" in accordance with the law, found to prevail in the whole of conduct, "that each later and higher order of means takes precedence in time and authoritativeness of each earlier and lower order of means." In criticizing Bentham Mr. Spencer goes so far as to say confidently that justice is a much simpler and more intelligible notion than happiness. Few students of the philosophy of law will admit this.

The conflict between egoism and altruism is discussed in some chapters which are the most generally interesting in the book, and are perhaps also the best in style and dialectic. Impatient persons will, however, be disappointed by the conclusion here as elsewhere in Mr. Spencer's work; for the result is, in short, that the evolution of morality tends to reconcile the claims of altruism and egoism, but that the reconciliation can be complete only when morality attains an ideal state. This leads to the enunciation of an important doctrine as to the function and scope of ethical science. Mr. Spencer holds that theoretical ethics, like theoretical mechanics, must deal with an ideal state of things, and work out results which can be only approximately true with regard to the actual world; the ideal moral state of society, however, being one which tends to be realized, and to which an indefinitely near approximation may in course of time

be made. Morality, like mechanics, can be made rational only by neglecting in the first instance the complications that occur in nature. These complications—the actual moral and social conditions of a given time and country—belong to “relative ethics”; in fact, the practical side of Mr. Spencer’s “relative ethics” is what other writers have called positive morality. On the other hand, the system of rational or “absolute ethics” is an ideal construction of human conduct such as it would be in an ideal society. The standard thus obtained will often be inapplicable as a working rule in particular stages of “relative ethics,” but will help us to estimate the amount of development which particular societies and systems have attained. At this point Mr. Spencer leaves us for the present. We need hardly say that his book offers far more matter for consideration than we have been able to dwell upon. It shows Mr. Spencer’s constructive power at its best, and takes rank in the highest order of philosophical writings,—those which give us not only arguments but ideas.

We now propose to carry somewhat farther the reflections arising from Mr. Spencer’s discussion of the nature and ethical import of pleasure. One result of it is to abolish once for all the crude form of hedonism with which utilitarians are commonly charged by their critics, and which has really been maintained by a few writers. It is no longer possible to start a serious argument on the old ground of the Chief Good. Without perhaps exactly aiming at it, Mr. Spencer has greatly cleared the field of dispute

concerning the moral end of action. He shows that all mankind are in a certain sense hedonists, and his proof requires the determination of that sense in a particular way. Now this way is the definition or specification of pleasure by that which is the true constant property of all things we call pleasant—namely, *preferable consciousness*, or to be more exact in language, *preferableness in consciousness*. This again involves a proposition belonging rather to metaphysic, or to the metaphysics of ethics, than to ethics proper—namely, that whatever is preferred or preferable is so in consciousness and not out of consciousness. It may seem to persons unversed in metaphysics a truism to state this; but the philosophical reader will not fail to see its importance. If its truth is allowed without difficulty, so much the better. We need not inquire here how far it may be ultimately consistent with Mr. Spencer's theory of the Unknowable. Enough that for ethical and practical purposes he assumes its solidity. The statement that Pleasure is the Chief Good, as analysed by him, becomes not so much an affirmation as a critical condition of proceeding to affirmations. It excludes the supposition that what is preferable can be out of consciousness. The end of human action, whatever it may be, is in and for consciousness.

This being so, we are able to see that the real and practical question left before us may be put thus: *What kind of consciousness is preferable?* This does not admit of any dogmatic or off-hand answer. Every man is indeed the judge, and the only judge,

of what his own actual preference is at a given moment. But this is of no philosophic significance. A man may say, "My pleasure is my good," meaning simply that he is minded to do as he likes without regard to other people's wants or likings. If he acts on this intention, his pleasures, and peradventure his desires too, may be cut short; but moral science has little to learn from that.<sup>1</sup> Preferable, in the sense of our question, means preferable with regard to some general standard. That such a standard exists is shown by the existence of society and morality. The question is how to investigate it. A right-minded man does in fact prefer certain modes of action and feeling to others, and feels that he *ought* to prefer them. What does this mean? Some say that the sense of duty is given by an intuition or "categorical imperative" which is in its nature antecedent to human experience, though of course it is not so in the experience of any individual man. And they endeavour, or should endeavour if they went on to construct an ethical system, first to define the transcendent principle or principles thus given, and then to deduce from them the actual contents of morality as applied to man's conduct in the world. Others, distrusting this method, or wholly denying its legitimacy, try to account for the sense of duty as itself a product of experience. They show how men living together may be expected, apart from any

<sup>1</sup> The degrees of amenability to ethical reason are infinite, down to that extreme obstinacy for which, by the laws of this realm, the only remedy is the herb Pantagruelion; the application whereof concerns not the moral philosopher but the sheriff.

transcendental supposition, to acquire the *form* of morality—that is, a feeling, which in our mature experience is peculiar in kind, of the distinction between right and wrong, and the *matter* of morality—that is, a more or less full and coherent body of opinion as to the rightness and wrongness of particular kinds of action. In this view the main contrast would seem to be not between the intuitionist and the utilitarian school of ethics, but between an intuitionist or dogmatic school on the one side and an historical one on the other. Utilitarianism does not necessarily belong to either of these. Utility may be assumed as a kind of transcendental principle, and in fact has been: as if one says, “We ought to do the will of God, and God wills the happiness of his creatures.” And a historical moralist might quite well arrive at some standard different from that of utility, or differently expressed.

I have used the word historical with a purpose. The modern doctrine of evolution has been expected to produce great results in the moral sciences. There have been enthusiastic hopes and some disappointment among its friends, and these have given occasion for some scoffing among enemies, which, for the rest, it is quite strong enough to bear. It has been somewhat overlooked that the way of considering things produced by Mr. Darwin's and Mr. Spencer's work in the natural sciences, and extended by Mr. Spencer to the whole field of knowledge, had to some extent been anticipated in the moral and political ones. Early in the present century the historical school of

thinkers began their work, chiefly in Germany. Wearied of dogmatism and precarious deduction, they sought to make sure how ideas and institutions had in fact come to be what they are. Hence the modern development of historical scholarship, and, one may almost say, of a new historical science. At the same time, it must not be forgotten, what we now call the doctrine of evolution was already budding into life. The two movements of thought were substantially parallel, though in the natural sciences the movement was longer in ripening, and broke on the world in its maturity with a shock of surprise. Future historians will not omit to note that Mr. Darwin's *Origin of Species* and Sir Henry Maine's *Ancient Law* were made public within a year or two of each other. Diverse as these works are in matter and form, they are akin in spirit and in method. The historical method was the foreshadowing of evolution in the political sciences, and the theory of evolution is the frank application of the historical method in natural science.

Our English school of ethics and psychology, notwithstanding the dogmatic pedantry to be found in one or two of its expounders, is in the main historical in its procedure and its tendencies. Thus it was ready to assimilate from the side of natural history whatever the doctrine of evolution had to give it. But for the same reason the process had to be natural and gradual, not revolutionary. The moral philosophy of the English school could suffer no fundamental disturbance in receiving ideas which after all were so

kindred to those which had long been at work in its own sphere. George Grote passed for a representative of the old-fashioned utilitarianism. But his *Fragments on Ethical Subjects* are thoroughly historical in tone and treatment. It seems to me that they fit in exceedingly well to Mr. Darwin's contributions to ethics in the early chapters of his *Descent of Man*, and may be taken as forming a link between the older and the newer expositions of the English school. There is no discontinuance of the philosophical tradition, no abandonment of the ground already won, and flying off with some new kind of wings, as some of us once dreamt. Workers in ethical inquiry are using new light like workers in any other science. It is their business neither to be dazzled by it nor to neglect it. Meanwhile it is too early to demand all its results at once.

Those who expected evolution to produce a new system of ethics are naturally disappointed; those who imagine that all or most evolutionists expect to do this find herein a tempting ground for criticism. One criticism of this kind, well representing what we may call a moderately transcendental view, may be found in a volume of *Studies in Philosophy and Literature*, published by Professor Knight of St. Andrews in 1879. It may be instructive to take some note of it. The doctrine of evolution, as a scientific doctrine, is accepted by Professor Knight with little reserve. If not actually proved, "it has been rendered the almost inevitable conclusion of the scientific intellect." The nature of the evidence is



well understood, and the commonplace objection from "missing links" is dismissed with something like contempt. The problem is not to make out a complete series of forms with the least possible difference between each one and the next to it. "Demonstration of the theory will not be accomplished even by a discovery of *all* the missing links, but by a scientific use of the links which we possess, and by warrantable inferences from them." Further, Professor Knight allows that "the growth of ethical sentiment and dogma out of pre-historic elements" must be taken as an established fact. But he adds, and with correctness as far as the purely dialectical aspect of the matter goes, that this makes no difference to the ultimate question of the nature of the moral faculty, which belongs to the metaphysical as distinguished from the practical side of ethics. The general objections to all derivative or historical theories of morals remain much as they were, and Professor Knight thinks them insuperable. His chief difficulty is that any such theory leaves us "in a helpless position . . . in the exercise of moral approbation and disapprobation." We confess that we cannot see how or why the historical moralist is left helpless. It is said that, if morality be derivative and evolved, there is no absolute standard of right and wrong; and it is inferred that in the absence of such a standard moral judgment must be at fault. Now Mr. Herbert Spencer has, in the work of which we have just spoken, met this objection by showing that the theory of evolution, as applied to ethics, may be conceived as furnishing us

with an absolute standard in a certain sense, though a standard applicable only with allowances to the existing relations of men in existing societies. But, even granting that no absolute standard can be found, we do not want an absolute standard to guide us in the exercise of moral approbation and disapprobation. All that we need is a standard sufficiently adapted to the conditions of life in which we act and judge for the time being. Our present conception of right conduct is more refined and stringent—in some considerable respects, at least—than that of our ancestors even two or three centuries ago. Some centuries hence we hope that the morality of our descendants may in turn be more refined and stringent than our own. We mean the average working rules of morality as actually enforced by society. And what then? We fail to see any ground for dissatisfaction. Again, Professor Knight seems to think that on any derivative theory we are bound to admit that the moral judgments of mankind (how many and which of them?) at a given time are always relatively right; in his own words, “on the principle of evolution, all the phases through which the ethical sentiment has passed were of equal validity for the particular stage which human nature had reached in its upward career.” We do not understand what is meant by “equal validity.” Moral feeling is, on the historical theory in its English form, and especially when evolution is taken into account, the resultant of certain social feelings and tendencies of man, guided by ancestral and individual experiences of utility. But experience must be interpreted

before it can be applied; and right interpretation is itself a matter of long and painful experience. A moral judgment is, in ultimate analysis, a judgment as to what kinds of action help or hinder social or individual welfare. But the judgment is liable to error, and sometimes does err; the feeling which embodies habitual processes of judgment may be affected with the same errors, and may also suffer from organic weakness or perversion. Experience shows us, what we should otherwise expect if the doctrine of evolution be true, that a general relaxation of moral sentiment is a possible occurrence, and fraught with mischief to the man or the nation in whom it takes place. The mischief is the same in kind, whatever be the particular contents of existing positive morality. There is an amount of moral perversion which entails corruption and destruction on the society in which it prevails. And it is to be noted that with increasing culture and civilization the margin of comparatively harmless aberration becomes narrower; the interaction of men's lives and thoughts being quicker, more extensive, and of graver consequence.

When, therefore, Professor Knight says that, according to recent evolutionists, "the verdict of society, based on the unconscious perceptions of utility transmitted through a thousand generations, makes a thing either right or wrong," and again where he speaks of "a conventional rule of expedient action" as being the only rule for the moralist of the empirical or historical school, he misses a point of exceeding importance. The verdict of society does not *make*

right and wrong; it embodies the prevalent opinion of society as to what *is* right and wrong. This opinion is derived—not by “unconscious perceptions,” but by the partly unconscious and partly conscious consolidation of a vast number of perceptions of a pretty striking kind—from a great body of antecedent experience of things turning out well and ill. Generally speaking, there is some presumption in favour of the rules thus established; in many cases it is irresistible. The burden of proof lies on him who alleges that an existing moral rule is unreasonable. The evidence he may conceivably adduce is of various kinds; for example, that the origin of the rule can be traced with certainty to a particular superstition, that it is not admitted by other equally civilized societies in similar circumstances, or that it is repugnant to other moral rules of equal or greater authority. What is the effect of a particular course of conduct is a question of fact; and, if the historical moralist reduces ethical problems to questions of fact, he must for that very reason be the last of all men to be content with conventional solutions. He will admit that the positive morality of a given society at a given time is, in a certain sense, provisional; but that is quite another thing.

Neither do we understand how moral rules of action, however analysed and accounted for, can be called conventional. Positive laws are conventional, and so are all express rules made by persons having authority to make them—such as the by-laws of a corporation, or the orders of a club committee.

Morality and good manners (which last is only a name of the morality of everyday life) command us to observe those conventional rules which concern us. There may be exceptions of necessity or higher duty, but under ordinary conditions we need not think of them, and had better not. But the rule of morals or manners is not itself conventional. A convention is by its nature express; a moral rule is not express. If a certain number of persons—for example, a religious order—formulate rules which they intend to observe as being moral, their expression of those rules is binding on them as a convention, and not otherwise. Suppose the express rule is pitched higher than the average standard of the community, then a member who breaks it will be justly blamed, not for failing to be better than the general conscience of his neighbours expects men to be, but for not performing an obligation he willingly undertook. Suppose the rule merely sets forth a moral duty as generally understood; in that case it may be good for the individual as a form of pious resolve, but the duty itself is just where it was. There may also be societies, and even religious societies—the Thugs, for example—whose rules are contrary to common morality. In such a case their convention avails nothing in the eyes of the community. The wrongdoer is blamed according to the common rule; nor does he get any credit for keeping his perverse convention, since it is thought that he should have known better than to make it. But perhaps a conventional rule means, in the language of transcendental moralists, only a rule which does not claim

absolute and universal validity. In that case, the objection implied in the epithet has already been answered. Or if it means a rule depending on a consent which may be tacit and informal, this has been answered too ; for we said that the consent of society establishes and enforces moral rules, but it does not make them what they are.

It is perfectly true that the historical treatment of ethics, reinforced or not reinforced by the doctrine of evolution, cannot explain the peculiar quality of the sense of duty. The conditions upon which the moral sentiment arises, and the manner in which it is fostered in men and nations, are in its province and power. It can give, or may be conceived to give, a sufficient account of these. It cannot account for the specific nature of the feeling as we experience it. And of this a great point is made both by the old-fashioned intuitionists and by the newer transcendentalists of the critical school. It is a point they are entitled to for its full worth. Only they seem to forget that the case is not unique. Every feeling is, as feeling, ultimate and unaccountable. We know that the sensation of red arises when the retina is excited by vibrations of a certain wave-length, and the sensation of violet by vibrations of a certain other length. But why the specific sensations of red and violet should be what they are, and not otherwise, is a thing passing the wit of man to tell. As little do we know why sensations of light and of sound should be in kind what they are, and differ from one another as they do ; nor are we like, as it seems at present, ever to know more.

Again, biology may do much to explain the conditions of pleasure and pain, and their significance with regard to the welfare of the organism in which they are felt. But the pleasurable or painful quality of this or that impression, as we actually feel it, is a primary fact of consciousness, and admits of no explanation. In like manner the sense of æsthetic satisfaction or dissatisfaction will hardly be maintained by any one at this day to be otherwise than exceedingly complex—we mean from a historical point of view. Yet this too, such as it is present in feeling, is peculiar in kind, and not reducible to terms of anything else. It is worth remark, and has been more than once remarked, that the æsthetic and the moral sense have curious affinities. Thus there are kindred feelings of repugnance in dwelling on ugliness and on wickedness; there is a kindred apprehension in the healthy taste and the healthy conscience that to dwell on such things is not wise or safe. In fine, this ultimate and irreducible property of the moral sense appears, if we carefully examine it, to be nothing else than the property of all feeling, so far forth as we consider it simply as feeling. And to expect of the moralist to be ready with an explanation of it in this sense is to expect that which in all other departments of human knowledge is admitted to be impossible. It appears at least open to reasonable doubt whether this be a sure ground for building up schemes of the Categorical Imperative and doctrines of the Practical Reason.

In this and other ways most of the current objec-

tions to the historical school of ethics appear to us misconceived or beside the point. Nevertheless we hold that there is ample scope for an analytical investigation of human action which may be fitly called the metaphysic of ethics. The proposition already made use of, that the end of action, or that which is preferable, is in consciousness and not out of consciousness, belongs to this inquiry. Questions in the same region of thought may be readily devised. Such are these, for example: Whether desire, pleasure, and pain are necessary elements of action, and whether an active intelligence apart from those elements is conceivable? Whether the end of action is to be conceived as single? Whether, if single, it is to be conceived as in fact attainable? If not attainable, whether it is to be thought of as an ideal which shifts in the act of being realized, like happiness as commonly conceived, or as a fixed mark to which indefinite approximation, but only approximation, is possible, like the perfection of the Stoic Wise Man, or Mr. Herbert Spencer's "absolute morality"? Evidently the historical method will not help us here. Yet these questions must be allowed to be legitimate, and to have a certain speculative interest.

The nature and place of this branch of ethical speculation may perhaps be illustrated by the analogy of jurisprudence. It stands to historical and practical ethics in much the same relation as the analysis of ultimate legal notions, such as law, duty, right, status, liability, does to the study of legal institutions as they exist, and of their origin and growth in the past.



History is fertilized by analysis, and analysis is guided by history, but each works in its own way. The results of each method stand side by side, of equal validity on their own ground. As the history of Parliament does not explain the nature of legal duty, so the history of morality does not explain the nature of conscience. As the analysis of legal duty will not serve for an index to the Statutes, so the analysis of conscience will not much help us to know the bidding of morality here and now. Both methods have their uses and their proper field of inquiry. They are in a manner apart, yet it is best to know how to work in both; and those whose work lies in one only will do well not to neglect the other.



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